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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1949

No. 154

WONG YANG SUNG, PETITIONER,

vs.

J. HOWARD McGRATH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED JULY 1, 1949.

CERTIORARI GRANTED OCTOBER 10, 1949.

APPENDIX

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10009

WONG YANG SUNG, *Appellant*,

v.

TOM CLARK, Attorney General of the United States, WATSON B. MILLER, United States Commissioners of Immigration and Naturalization, *Appellees*.

Appeal from the United States District Court for the District of Columbia.

JOINT APPENDIX.

Filed July 23 1948

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

WONG YANG SUNG, 656 Pennsylvania Avenue, S. E., Washington, D. C., *Petitioner*,

v.

TOM CLARK, Attorney General of the United States, WATSON B. MILLER, United States Commissioner of Immigration and Naturalization, both of Washington, D. C., *Respondents*.

Petition for Writ of Habeas Corpus

To the Honorable Judges of the District Court of the United States for the District of Columbia:

The petitioner, Wong Yang Sung, respectfully shows unto the Court as follows:

1. That he is a citizen of the Republic of China, and that he has resided in the United States since his arrival at New York City, on April 21, 1946, and that he is presently unjustly and unlawfully detained and imprisoned at a District of Columbia Jail, and restrained of his liberty by respondents, and under color and pursuant to deportation proceedings hereinafter more fully set forth.

2. That on or about the 14th of October, 1947, your petitioner was taken into custody under a warrant of arrest issued by the Attorney General dated October 13, 1947. On December 11, 1947, petitioner was accorded a hearing before a Presiding Inspector under said warrant of arrest and at the conclusion of said hearing was ordered deported. An appeal to the Board of Immigration Appeals was dismissed. The Attorney General signed a warrant of deportation on your petitioner effective July 23, 1948.

2 3. Petitioner shows that his detention, confinement and restraint of liberty is unlawful and without authority in law on this:

That the commitment or order under which petitioner is purported to be presently confined, is illegal and void because the United States Immigration authorities failed to comply with the statutory requirements provided by Title 8, U. S. C. Section 137(9) and 156 which states that hearings of this type must be held in accordance with the Administrative Procedure Act, 60 Stat. 243, Title 5 U. S. C. Section 1001, et seq.

4. Petitioner further shows that the purported hearing was in conflict and directly opposed to the mandatory provisions of the Administrative Procedure Act in that:

(a) The presiding officer was responsible to and subject to the supervision and direction of the respondents, their officers, employees, or agents who are engaged in the performance of investigation and prosecuting function;

(b) The presiding officer was not qualified as a competent examiner subject to the Civil Service and other laws of the United States;

(c) The presiding officer was not assigned to the hearing in rotation.

Petitioner charges that the action of the government in failing to comply with the mandatory requirements of the aforesaid Act rendered the proceedings void and were in violation of the Fifth Amendment to the Constitution of the United States.

5. That notwithstanding all the foregoing, the Attorney General has issued a warrant for the deportation of your petitioner to China, and your petitioner is now illegally detained, imprisoned, and restrained of his liberty by the respondents, at the office of the United States Marshal, Washington, in the District of Columbia, within the jurisdiction of this Honorable Court.

3 Wherefore, the petitioner prays that a writ of habeas corpus issue herein, requiring the respondent

to produce before this Honorable Court, his body together with the cause of his detention to receive and abide by such order as may be made herein.

WONG YANG SUNG,
Petitioner.

THOMAS A. FARRELL,
LEO J. MICHALOSKI,
Attorneys for Petitioner,
500 Southern Building,
Washington, D. C.

• • • • • • • • • • •

4 Filed July 23 1948

Order Issuing Writ of Habeas Corpus

Now on this 23d day of July, 1948, the above matter coming on upon the petition for the issuance of a writ of habeas corpus, it is hereby ordered that said writ issue as in said petition prayed, returnable to and before this court at 10 A.M., of the 28 day of July, 1948.

ALEXANDER HOLTZOFF,
Justice.

• • • • • • • • • • •

5 **Habeas Corpus**

UNITED STATES DISTRICT COURT
DIVISION, ... DISTRICT OF COLUMBIA

H. C. 3420

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To 1. Tom Clark, Attorney General of the United States,
2. Watson B. Miller, United States Commissioner of Immigration and Naturalization, Washington, D. C.
3. or their agent—Charles B. Frank. —Greeting:

You are hereby commanded, that the body of Wong Yang Sung by you restrained of his liberty, as it is said detained

by whatsoever names the said Wong Yang Sung may be detained, together with the day and cause of his being taken and detained, you have before the Honorable Alexander Holtzoff, Judge of the United States District Court in and for the District of Columbia, at the court room of said Court, in the City of Washington at 10:00 o'clock a. m., on the 28th day of July, 1948, then and there to do, submit to and receive whatsoever the said Judge shall then and there consider in that behalf; and have you then and there this writ.

Witness the Honorable Bolitha J. Laws, Chief Justice, United States District Judge at Washington, D. C. this 23rd day of July, A. D. 1948.

HARRY M. HULL,
Clerk.

By ANNE W. LYDDANE,
Deputy Clerk.

6 **United States Marshal's Return**

Washington, District of Columbia, ss:

Received the within writ the 23rd day of July, 1948, and executed same by serving Tom Clark, Atty. General, by personally serving Peter Brown, Exec. Acct. 7-23-48; Watson B. Miller, U. S. Courier, Immigration and Naturalization; by personally serving L. P. Winings, General Counsel, 7-26-48; and their agent, E. L. Farrell, 7-23-48.

W. BRUCE MATTHEWS,
U. S. Marshal.

E. J. BARCLAY,
C. E. RAMEY,
By E. V. BERQUIST,
Deputy Marshals.

7 Filed July 28 1948

Return and Answer to Writ of Habeas Corpus

Comes now the respondents in the above-entitled proceeding, and in obedience to said writ, produces the body of the petitioner at the time and place directed therein and for cause of detention respectfully shows that he holds the petitioner under and by virtue of a commitment issued by the United States Department of Justice, Immigration and Naturalization Service, a copy of which is hereto attached and made a part of this response.

Wherefore, having fully answered, respondents pray the judgment of the Court in the premises.

GEORGE MORRIS FAY,
United States Attorney.

OLIVER O. DIBBLE,
Assistant United States Attorney.

* * * * * * * * * *

9 Filed Jul 29 1948

Findings of Fact and Conclusions of Law

Upon consideration of the petition, the writ, and the return and answer thereto, and the evidence deduced in open court, the court finds as a fact:

1. That the petitioner, Wong Yang Sung, was provided a hearing by the Immigration and Naturalization Service of the United States Department of Justice on December 11, 1947, to determine petitioner's right to remain in the United States.

2. That said hearing was in accord with the provisions of law that govern same.

3. That as a result of the aforesaid hearing the petitioner was declared illegally in the United States and ordered deported therefrom.

Wherefore, the court concludes as a matter of law:

1. That Section 7(a) of the Administrative Procedure Act, (60 Stat. 243, Title 5 USC, Section 1001), is not applicable to hearings held by the Immigration and Naturalization Service of the United States Department of Justice.

2. That the petitioner is not unlawfully detained.

3. That the petitioner is not entitled to be released from the custody of the respondents.

ALEXANDER HOLTZOFF,
Justice.

• • • • • • • • • • •

10 Filed Jul 29 1948

Order

Upon consideration of the petition, the writ, the return and answer filed herein and upon the evidence as adduced in open court, it is by the court this 29th day of July, 1948.

Ordered, adjudged, and decreed, that the petition filed herein be denied, the writ discharged, and the petitioner remanded to the custody of the respondents. Upon the giving of a $1,000 bond said petitioner shall be released pending appeal.

ALEXANDER HOLTZHOFF,
Justice.

• • • • • • • • • • •

11 Filed Aug 2 1948

Notice of Appeal

Notice is hereby given this 2nd day of August, 1948, that Wong Yang Sung, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 29th day of July, 1948 in favor of Respondents against said Petitioner.

LEO J. MICHALOSKI,
THOMAS A. FARRELL,
Attorneys for Petitioner.

United States Court of Appeals

FOR THE

DISTRICT OF COLUMBIA CIRCUIT

No. 10009

WONG YANG SUNG, APPELLANT

v.

TOM CLARK, Attorney General of the United States, WATSON B. MILLER, United States Commissioner of Immigration and Naturalization, APPELLEES

Appeal from United States District Court for the District of Columbia

---

Argued February 8, 1949 Decided April 4, 1949

Mr. Leo J. Michaloski, with whom *Mr. Thomas A. Farrell* was on the brief, for appellant.

Mr. L. Clark Ewing, Assistant United States Attorney, with whom *Messrs. George Morris Fay*, United States Attorney, and *Oliver O. Dibble* and *John D. Lane*, Assistant United States Attorneys, were on the brief, for appellees. *Messrs. L. Paul Winings*, General Counsel, and *Robert L. Jefferys*, Attorney, Immigration and Naturalization Service, were also on the brief for appellees.

Before EDGERTON, PRETTYMAN, and PROCTOR, JJ.

PER CURIAM: The judgment of the District Court is affirmed on the opinion of Judge Holzoff. *Wong Yang Sung* v. *Clark*, 80 F. Supp. 235. It is immaterial that appellant entered the United States legally. *Azzollini et al.* v. *Watkins*, (C. A. 2d) decided March 10, 1949.

[fol. 9] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Apr. 4, 1949. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, APRIL TERM, 1949

No. 10009

WONG YANG SUNG, Appellant,

vs.

TOM CLARK, Attorney General of the United States; WATSON B. MILLER, United States Commissioner of Immigration and Naturalization, Appellees

Appeal from the United States District Court for the District of Columbia

Before: Edgerton, Prettyman and Proctor, JJ.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby affirmed.

Per curiam.

Dated April 4, 1949

[fol. 10] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Jun. 2, 1949. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT

No. 10009

WONG YANG SUNG, Appellant,

vs.

TOM C. CLARK, Attorney General of the United States, and Watson B. Miller, United States Commissioner of Immigration and Naturalization, Appellees

DESIGNATION OF RECORD

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint appendix.
2. Judgment.
3. Designation of Record.
4. Clerk's certificate.

Thomas A. Farrell, Leo J. Michaloski, Jack Wasserman, Attorneys for Appellant.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Designation of Record has been served upon the Appellees by mailing a copy thereof to their attorney, Hon. George Morris Fay, United States District Attorney, at Washington, D. C. this 1st day of June, 1949.

(S.) Jack Wasserman.

[fol. 11] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit, hereby certify that the foregoing pages, numbered 1 to 10, both inclusive, constitute a true copy of the joint appendix to the briefs of the parties and the proceedings of the said Court of Appeals, as designated by counsel in the case of: Wong Yang Sung, Appellant, v. Tom Clark, Attorney General of the United States, Watson B. Miller, United States Commissioner of Immigration and Naturalization, Appellees, No. 10,009, April Term, 1949, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this seventh day of June, A. D. 1949.

Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit.
(Seal.)

[fol. 12] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Clark took no part in the consideration or decision of this application.

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JUL 1 1949
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 154

WONG YANG SUNG,

Petitioner,

vs.

TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, UNITED STATES COMMISSIONER OF IMMIGRATION AND NATURALIZATION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT.

THOMAS A. FARRELL,
LEO J. MICHALOSKI,
Southern Bldg.,
Washington, D. C.,
Attorneys for Petitioner.

JACK WASSERMAN,
GASPARE CUSUMANO,
THOMAS M. COOLEY, II,
for
Association of Immigration and Nationality Lawyers,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No.

WONG YANG SUNG,

Petitioner,

vs.

TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, UNITED STATES COMMISSIONER OF IMMIGRATION AND NATURALIZATION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT.

The Petitioner, Wong Yang Sung, by his attorneys, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit (R. 9) affirming an order of the District Court for the District of Columbia (R. 7) discharging the writ of habeas corpus herein.

Opinions Below

The Court of Appeals affirmed the order in a per curiam opinion (R. 8). The opinion of the District Court is reported at 80 F. Supp. 235.

Jurisdiction

The judgment of the Court of Appeals was entered on April 4, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented

1. Whether the hearing accorded an alien in a deportation case is a hearing "required by statute" and as such subject to the provisions of the Administrative Procedure Act (5 U. S. C. 1004-c) which require that hearing officers shall not be subject to the supervision of officials engaged in investigative or prosecuting functions.

2. Whether hearing officers in deportation proceedings are required to be appointed pursuant to the Administrative Procedure Act (5 U. S. C. 1010) and assigned to hearings in rotation.

3. Whether deportation proceedings are exempt from the terms of the Administrative Procedure Act by reason of the fact that they are "specified classes of proceedings . . . before . . . officers specially provided for by or designated pursuant to statute." (5. U. S. C. 1006).

Statutes Involved

Section 16 of the Immigration Act of February 5, 1917, as amended, 39 Stat. 885, 8 U. S. C. 152 provides:

> ". . . The inspection . . . of aliens, including those seeking admission or readmission to or the privilege of passing through or residing in the United

States, and the examination of aliens arrested within the United States under this section, shall be conducted by immigrant inspectors, except as hereinafter provided in regard to boards of special inquiry. . . . Said inspectors shall have the power to administer oaths and to take and consider evidence touching the right of any alien to enter, reenter, pass through, or reside in the United States, and, where such action may be necessary, to make a written record of such evidence."

Section 19 of the Immigration Act of February 5, 1917, as amended, 39 Stat. 889, 8 U. S. C. 155 provides:

"At any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this chapter . . . shall, upon the warrant of the Attorney General, be taken into custody and deported. . . . In every case where any person is ordered deported from the United States under the provisions of this chapter, or of any law or treaty, the decision of the Attorney General shall be final."

Section 5 of the Administrative Procedure Act of June 11, 1946 (5 U. S. C. 1004) provides:

In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, . . .

(c) *Authority and function of officers and employees.* The same officers who preside at the reception of evidence . . . shall make the recommended or intial decision . . . Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party or any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any

officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 1007 of this title except as witness or counsel in public proceedings."

Section 7 of the Administrative Procedure Act (5 U. S. C. 1006) provides:

"In hearings which section 1003 or 1004 of this title requires to be conducted pursuant to this section——

(a) There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this chapter; but nothing in this chapter shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute."

Section 11 of the Administrative Procedure Act (5 U. S. C. 1010) provides:

"Subject to the civil-service and other laws to the extent not inconsistent with this chapter, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 1006 and 1007 of this title, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission

independently of agency recommendations or ratings and in accordance with sections 661-663, 664-669, 670-782, 673, and 674 of this title, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 667 of this title, and the provisions of section 669 of this title, shall not be applicable."

Statement

Petitioner is a citizen of China who has resided in the United States since his arrival on April 21, 1946. He was arrested in deportation proceedings on October 14, 1947 on a warrant issued the preceding day. After hearings on December 11, 1947 and January 29, 1948, his deportation was directed on the charge that he remained in the United States after legal admission for a period longer than permitted under the Immigration Laws (8 U. S. C. 214; 8 C. F. R. 120.37). An appeal from the order of deportation was dismissed by the Board of Immigration Appeals on June 4, 1948.

The petition for *habeas corpus* filed on July 23, 1948, alleged that the hearing was not conducted in conformity with the Administrative Procedure Act, 5 U. S. C. 1004, 1010. On July 29, 1948 District Judge Alexander Holtzoff discharged the writ on the ground that deportation hearings were exempt from the Administrative Procedure Act under 5 U. S. C. 1006(a). On April 4, 1949 the United States Court of Appeals for the District of Columbia affirmed by *per curiam* opinion.

Reasons for Granting the Writ

This writ of certiorari is sought because the issues presented herein raise an important question of federal law that has not been but should be settled by the Supreme Court, *i. e.* whether the deportation process is subject to the Administrative Procedure Act.

Whether immigration proceedings involving the admission of aliens are subject to the Administrative Procedure Act was raised but left undecided by the Supreme Court in *Johnson* v. *Shaughnessy*, 93 Law Ed. 849 (October, 1948, Term).

During the 80th Congress the Immigration Service actively sought the enactment of a bill to specifically exempt it from the application of the Administrative Procedure Act (H. R. 6652 and S. 2755). Congress declined to approve this legislation. A bill is now pending in the 81st Congress to accomplish the same end (Section 5 of H. R. 10). It thus appears that the Department of Justice recognizes that the legal issue presented is not only controversial but that its position is sufficiently doubtful to require the aid of a specific legislative exemption from the application of the Administrative Procedure Act.

It is therefore respectfully submitted that the controversy attendant upon the construction of the Administrative Procedure Act should be settled by the Supreme Court. The instant case was the first to consider the deportation process exempt from the Administrative Procedure Act under the provisions of 5 U. S. C. 1006. It has become the leading case on the subject. The ruling herein merits review by the Supreme Court to settle important issues of federal law which will affect the conduct of thousands of deportation hearings.[1]

Argument

Petitioner contends that the deportation proceeding herein was unfair because it violated Sections 5 and 11 of the Administrative Procedure Act (5 U. S. C. 1004, 1010) which requires separation of functions and independent

---

[1] The Immigration Service estimates that there are an average of 18,000 deportations annually.

hearing examiners. The Deportation Process is within the Administrative Procedure Act because:

I. Deportation hearings are required by statute.

II. Section 7 of the Administrative Procedure Act (5 U. S. C. 1006) which exempts special classes of hearings before officers designated by statute does not exempt deportation hearings.

(a) Section 16 of the Immigration Act of 1917 (8 U. S. C. 152) does not relate to the *conduct* of deportation hearings but merely to the *inspection* of aliens and the authority of immigrant inspectors.

(b) Immigrant inspectors do not possess the qualifications contemplated by 5 U. S. C. 1006.

I

The Deportation Hearing Herein Was Unfair and in Violation of the Administrative Procedure Act

If deportation proceedings are required to be held pursuant to statute, then they are subject to the Administrative Procedure Act and the instant hearing was unfair because it was conducted in violation of its provisions.

Section 5 of the Administrative Procedure Act requires hearing officers to be detached from investigative and prosecuting functions. "The separation of functions must be reflected in the rules of organization and procedure published pursuant to section 3(a)" of the Administrative Procedure Act. (P. 262 Legislative History of the Administrative Procedure Act, Senate Document 248, 79th Congress).

There is no dispute that the Immigration Service failed to comply with this mandate of the Administrative Procedure Act.

S. 675, 77th Congress, 1st Session, was one of the bills which preceded S. 7 which became the Administrative Pro-

cedure Act. Section 301 of S. 675 applied to proceedings where "legal relations are required by law to be determined after opportunity for hearing."

Major Schofield, head of the Immigration Service, testified on April 30, 1941 before a Senate Judiciary Sub-Committee as follows with reference to S. 675:

> "Through section 301, it applies its hearing-commissioner system only to cases where by law formal procedures are now required. In other words, as we read it, its requirements apply only to deportation and exclusion cases . . . We think that the hearing-commissioner system would improve our present procedures to a considerable extent without stultifying the administration of the laws. . . . Now we use inspectors to hear cases who are engaged in other activities when not acting as presiding officers. Both S. 675 and S. 674 would prevent this and would require a staff of hearing commissioners devoted solely to hearing and deciding cases." (pp. 571, 575, Hearings on S. 674, 675, 918, 77th Cong. 1st Sess.)

It is equally clear that the Immigration Service has not selected its presiding officers in conformity with Section 11 of the Administrative Procedure Act.

When the application of the Administrative Procedure Act to deportation proceedings was first discussed by the Immigration Service and the Department of Justice, it was concluded by the Service and the Department that *exclusion proceedings* did not fall within section 5(c) because the *admission procedure* was an initial application for a license. Examiners were not appointed pursuant to section 11 of the Administrative Procedure Act because Section 7(a) exempted statutory hearings and Section 17 of the Immigration Act of 1917 prescribed the qualifications and manner of appointment of officers and regulated the conduct of such

hearings. (*House Report 2140, 80th Congress 2nd Sess.*, pp. 4-5).

On the ground that the deportation statute (Section 19 of the Immigration Act of 1917) "does not require an adjudication 'to be determined on the record after opportunity for an agency hearing' it was concluded by the Immigration and Naturalization Service, with the approval of the Department of Justice, that the adjudication requirements of the Administrative Procedure Act were not intended by Congress to apply to the immigration statutes providing for deportation of aliens unlawfully in the United States" (*House Report 2140, 80th Congress*, 2d Session).

Former Immigration Commissioner Carusi, frankly admitted the non-compliance of the Service with the provisions of the Administrative Procedure Act, stating:

> "If the Administrative Procedure Act purported to govern 'hearings required by law', we would consider ourselves bound by its provisions. It is highly significant that such language was . . . modified in the final draft so as to refer only to hearings 'required by statute'" (*The Federal Administrative Procedure Act and the Immigration and Naturalization Service* by Commissioner Carusi, February 1947 Monthly Review, Immigration Service at p. 103).

In testimony before the Senate Subcommittee on Immigration on S. 2755, 80th Congress, on June 9, 1948, the General Counsel of the Immigration Service, the Assistant Commissioner of Immigration Service and the Attorney General's office urged the enactment of a bill to exempt the Immigration Services from the provisions of the Administrative Procedure Act. These witnesses explained that deportation hearings were not being conformed to the Administrative Procedure Act because the hearing was one required by law and not by statute. (Pp. 4-6, 11-12, 21-22 of

Testimony on file with Senate Immigration Subcommittee.) David Reich, representing the Attorney General, stated as follows (at p. 12):

> "In deportation proceedings, as has been stated by Mr. Savoretti (Assistant Commissioner of Immigration) and Mr. Winings (General Counsel), there is no requirement by statute for a hearing."

This was the contemporaneous administrative construction given to the Administrative Procedure Act by the Attorney General and the Immigration Service.

Nevertheless in the instant case the government urged and District Judge Holtzoff found that deportation was a proceeding before an officer "specially provided for or designated pursuant to statute." This ruling could only be reached on the assumption that deportation hearings were statutory—otherwise the exemption of 5 U. S. C. 1006 would be inapplicable. (The correctness of this ruling will be discussed more fully in Point II.) In its brief in the Court of Appeals (p. 7) the government declared:

> "It is plain from the wording of the statute itself (8 U. S. C. 152) that the examination and *hearing* granted aliens arrested under the Immigration Act shall *by virtue of the express provisions of the Immigration Act* be conducted by immigrant inspectors."

At the same time, the Government also contended that the requirement of a hearing in deportation "is one which has evolved by judicial decision applying customary concepts of due process. Thus, the hearing is one 'required by law' rather than one 'required by statute'" (p. 13, Brief in Court of Appeals).

It is the contention of petitioner that deportation hearings are subject to Sections 5 and 11 of the Administrative Procedure Act (5 U. S. C. 1004, 1010) because the hearings are required by statute as the term is used in that Act. The

Supreme Court has held that the immigration statutes are to be construed to require a hearing on the record to adjudicate whether an alien is deportable.

Japanese Immigrant Case, 189 U. S. 86;
Kwock Jan Fat v. *White*, 253 U. S. 454;
Bridges v. *Wixon*, 326 U. S. 135.

This construction of the statute follows both the requirement of due process and the *Congressional intent*. In the *Japanese Immigrant* case, *supra*, at 100, 101, the court said:

> "But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution. . . . Therefore, it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized.
>
> "*This is the reasonable construction of the acts of Congress here in question.* . . . In the case of all acts of Congress, such interpretation ought to be adopted as, without doing violence to the import of the words used, will bring them into harmony with the Constitution." (Italics supplied.)

In *Bridges* v. *Wixon*, *supra*, the court stated:

> "As construed and applied in this case, *the statute calls* for the deportation of Harry Bridges after a fair hearing" (at p. 160).

In *American Power Co.* v. *S. E. C.*, 329 U. S. 90, the Supreme Court stated with reference to the Public Utility Holding Company Act:

> "That the statute does not expressly insist upon what in fact has been given the security holders is without constitutional relevance under the circumstances. Wherever possible, statutes must be interpreted in accordance with constitutional principles. Here, in the absence of definite contrary indications, it is fair to assume that Congress desired sec. 11(b)(2) be lawfully executed by giving appropriate notice and opportunity for hearing to all those constitutionally entitled thereto. See the Japanese Immigrant Case, 189 U. S. 86, 100-101 (at p. 108)".

In *Eisler* v. *Clark*, 77 F. Supp. 610, Judge Goldsborough held that Section 11 of the Administrative Procedure Act applied to deportation, stating:

> "The courts have read due process into the Act, and due process means a hearing, and . . . therefore hearing is an integral part of *the Deportation Act;* in fact, just as much as if the Act itself in words stated that a hearing should be held."
>
> Accord: 49 Columbia Law Review 73.

It should also be noted that Section 20 of the Immigration Act of February 5, 1917 (39 Stat. 890-891; 57 Stat. 511; 8 U.S.C. 156) specifically recognizes that hearings are required in deportation cases. It provides for the release of an alien on bond conditioned that "such alien shall be produced when required for a hearing or hearings in regard to the charge upon which he has been taken into custody." Indeed, if the deportation statutes did not require a hearing they would be unconstitutional. *Japanese Immigrant* case, *supra.* It would seem strange that Congress should require the application of the Administrative Procedure Act to cases where a statute *in haec verba* required a hearing

but not to cases where constitutional interpretation of the statute requires a hearing. Respect for the law does not thrive upon such capricious interpretations. *Delgadillo* v. *Carmichael*, 323 U. S. 388, 391.

The word "statute" when used in a federal enactment includes "Constitution."

A.F.L. v. *Watson*, 327 U. S. 582;
Phillips v. *U. S.*, 312 U. S. 246;
Hamilton v. *University of California*, 293 U. S. 245;
King Mfg. Co. v. *Augusta*, 277 U. S. 100, 103.

The legislative history of the Administrative Procedure Act confirms the fact that Congress intended to cover deportation hearings, i. e., where such hearings were required by statute although not required by the express terms of the statute.

Senate Document No. 248, 79th Congress, 1st Session, states with reference to section 5 at page 22:

> "Limiting application of the sections to those cases in which statutes require a hearing is particularly significant, because thereby are excluded the great mass of administrative routine as well as pensions, claims, and a variety of similar matters in which Congress has usually intentionally or traditionally refrained from requiring an administrative hearing."

It is clear from the above that Congress intended merely to exclude those cases where a hearing was granted as a matter of grace.

This is reinforced by Senate Document No. 248, 79th Congress at page 285, note 9, which states:

> "A statute may, in terms, require a rule or order to be made upon the record of a hearing, or in the usual case be interpreted as manifesting a Congressional intention so to require, and in either situation Sections 7 and 8 (of the Administrative Procedure Act) would apply save as other sections are operative."

By this language it appears clear that Congress not only included hearings required by statute *in haec verba* but also where hearings were required as a matter of statutory construction. It would therefore appear to be plain that deportation hearings are under the Administrative Procedure Act and particularly within sections 5 and 11.

II

Section 7 of the Administrative Procedure Act Does Not Exempt Deportation Proceedings

Judge Holtzoff in the instant case (80 F. Supp. 235) and the Second Circuit in *Azzollini* v. *Watkins*, 172 F. 2(d) 897 (C.C.A. 2, 1948), have held that by reason of Section 16 of the Immigration Act of 191[illegible] (8 U.S.C. 152), deportation hearings are conducted by officers designated by statute and that the deportation process is accordingly exempt from the Administrative Procedure Act. The complaint in the *Azzollini* case did not state a cause of action (81 F. Supp. 187) and the plaintiffs therein were subsequently relieved of the deportation orders by direction of the Board of Immigration Appeals on June 14, 1949. There was thus no opportunity or need to apply for certiorari in that case. Reference to the records and briefs in both cases will disclose that the deportation process was not fully explained to or understood by Judge Holtzoff [2] or the Second Circuit.

The initial step in a deportation case is the investigation of an alien by an immigrant inspector. This is followed by the issuance of a warrant of arrest and the formal deportation hearing.

8 C.F.R. 150.1, 150.3, 150.4a;

Steinberg, The Warrant Hearing in a Deportation Proceeding, Federal Bar Assn. Journal, July, 1945.

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[2] See: Criticism of decision by Gerard Reilly in *Sunday Star*, August 8, 1948.

Detailed provisions for the conduct of a deportation hearing are contained in 8 C.F.R. 150.6 and the presiding officer at the hearing may not be the same immigrant inspector who conducted the investigation (8 C.F.R. 150.6(b)).

Section 16 of the Immigration Act of 1917 (8 U.S.C. 152) does not provide for the *procedure* at the *formal deportation hearing*. Assuming that it applies to deportation at all, it merely grants authority to immigrant inspectors to *investigate* or *inspect*.

Section 16 of the Immigration Act of 1917 provides:

> "The inspection, other than the physical and mental examination, of aliens, including those *seeking* admission or readmission to or the privilege of passing through or residing in the United States, and the examination of aliens arrested within the United States *under this section*, shall be conducted by immigrant inspectors . . . . All aliens *arriving* at ports of the United States shall be examined by at least two immigrant inspectors . . . . Immigrant inspectors are hereby authorized and empowered to board and search for aliens any vessel, railway car, or any other conveyance, or vehicle in which they believe aliens are being brought into the United States. *Said inspectors shall have the power to administer oaths and to take and consider evidence touching the right of any alien to enter, reenter,* pass through, or reside in the United States, and, where such action may be necessary, to make a written record of such evidence; . . . All aliens *coming to* the United States shall be required to state under oath the purposes for which they come, the length of time they intend to remain in the United States, whether or not they intend to abide in the United States permanently and become citizens thereof, and such other items of information regarding themselves as will aid the immigration officials in determining whether they belong to any of the excluded classes . . . Every alien who may not appear to the examining immigrant inspector *at the port of arrival* to be

> clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry . . . The decision of an immigrant inspector, if favorable to the admission of any alien, shall be subject to challenge by any other immigrant inspector . . ." (Italics supplied).

It is doubtful that this section was intended to apply to any phase of the deportation process. *Contra, Graham* v. *U. S.*, 99 F. 2(d) 746. The section covers exclusion proceedings. The jurisdiction of immigrant inspectors and this section is defined in the first sentence to cover aliens seeking admission for temporary purposes or for residence.

Indeed, the section expressly provides that if the evidence thus developed does not establish beyond doubt the right of the alien to land, the alien shall be detained for examination before a Board of Special Inquiry. The conduct of the examination hearing before such Board is prescribed in detail in Section 17 of the Immigration Act of 1917.

In any event, assuming that the section covers the deportation process, it relates solely to the authority of inspectors to investigate or to take a preliminary statement in the initial informal state of the deportation process (8 C. F. R. 150.1 (a-c)).

In the *Report of the Secretary of Labor's Committee on Administrative Procedure* (The Immigration and Naturalization Service) by Marshall Dimock, Henry Hart and John McIntire (1940) at page 66 it is concluded:

> "*Basis of inquisitorial power*—Sweeping authority to question suspected aliens, *independently of any formal proceedings* against them, is conferred upon immigrant inspectors by Section 16 of the Act of 1917 . . . In the unsatisfactory fashion characteristic of the immigration statutes, however, this authorization appears in the middle of a long paragraph dealing primarily with procedure at the border, and some doubt

may exist as to whether it refers to *inquiries* concerning the rights of other than entering aliens. The Department, however, has taken the view that it does, and we are satisfied that such a view is correct." (Italics supplied.)

Section 16 of the Immigration Act of 1917 refers to the "inspection of aliens, the power of inspectors to administer oaths", "to take and consider evidence", "to make a written record of such evidence where necessary and to investigations . . . . conducted by an immigrant inspector." Not a word is said about the conduct of deportation hearings as in the case of exclusion "hearings" before Boards of Special Inquiry (39 Stat. 887; 8 U. S. C. 153). The taking of evidence in the form of a preliminary statement from the alien (8 C. F. R. 150.1) is obviously not a provision for the conduct of a formal deportation hearing. (8 C. F. R. 150.6)

It seems clear that the Attorney General and the Immigration and Naturalization Service have never regarded this section as one relating to formal deportation proceedings. In promulgating regulations concerning the arrest, deportation and conduct of hearings thereon (Part 150, Title 8, Code of Federal Regulations), the Attorney General does not cite Section 16 of the Immigration Act of 1917 as forming the statutory basis or authority for the regulations (see Note following 8 C. F. R. 150.1(f)). On the other hand, regulations concerning the inspection and investigation of *arriving* aliens all refer to Sec. 16 of the Immigration Act of 1917 as statutory authority for their issuance. (See, e. g., 8 C. F. R. 110.7 to 110.11, 110.41, 110.46, 110.49, 110.50; 8 C. F. R. 12.2; 8 C. F. R. 118.6; 8 C. F. R. 120.22 to 120.24; 8 C. F. R. 130.4, 130.6, 130.8; 8 C. F. R. 140.1)

The conclusion of the Secretary of Labor's Committee that 8 U. S. C. 152 refers to the informal preliminary state

of the deportation process is therefore well taken. This section thus cannot be made the basis for an exemption under 5 U. S. C. 1006. Section 16 (8 U. S. C. 152) does not provide for the conduct of a formal deportation hearing before an immigrant inspector and it has not heretofore been so interpreted by the Immigration Service.

Furthermore, it will be observed that the exemption of Section 7 of the Administrative Procedure Act, 5 U.S.C. 1006 "does not mean that agencies are authorized—whether pursuant to the express authority of other statutes or not—to avoid the examiner system—set up in this bill . . . by assigning general employees or attorneys to hear cases individually or as boards. In short, unless the agency or its members or *some specially qualified statutory officer* hears the case, an examiner qualified under section 11 of this bill must do so." (Congressman Walter, Senate Document No. 248, 79th Congress, 2nd Session, p. 364. See also: Page 268 and Attorney General's Manual on the Administrative Procedure Act, pp. 71-72.)

56 Yale Law Journal 701 states:

> "The committee reports indicate that the exemption should be strictly construed, and in particular that statutory provisions authorizing the use of employees or attorneys generally should not be considered authorization for exemption. However, some statutory boards listed by the Attorney General in the Senate Report as examples of the exempted class seem to fall within the group which the reports indicate is not exempted. The apparent conflict can only be resolved on the grounds that the statutes setting up these boards did not authorize the use of employees generally but rather specified that their members should be selected from among eligible employees designated as such by the agency head."

The article concludes that the Immigration Service is required to comply with Section 11 (5 U. S. C. 1010) and appoint independent examiners.

The qualifications of immigrant inspectors are set forth in Announcement No. 4-71-1 (1949) of the Board of U. S. Civil Service Examiners. They are not required to have any educational background but merely investigatory or interviewing experience. In this connection the provisions of 8 C.F.R. 60.27 should also be noted.

> "60.27. *Authority of patrol inspectors, special inspectors, naturalization examiners, and other officers to act as immigrant inspectors.* All persons serving under appointment heretofore or hereafter made as patrol inspectors, special inspectors, naturalization examiners, or other officers of the Immigration and Naturalization Service of a higher grade than patrol inspector, special inspector, or naturalization examiner are hereby designated immigrant inspectors without additional compensation. The work as immigrant inspectors shall be arranged by supervisory officers so as not to interfere substantially with the performance of the duties of the other positions."

The duties of patrol inspectors are described in announcement No. 101 of the United States Civil Service Commission, issued June 1, 1948. This announcement describes their work as follows:

> "Patrol Inspectors will be members of the Immigration Border Patrol, a mobile uniformed enforcement organization; incumbents will be required to perform patrol duties on foot, by motor vehicle, by airplane, or on horseback. They will receive physical training equivalent to that given to commando units of the Armed Forces."

Although patrol inspectors are required to pass an aptitude test, there is no educational requirement for the posi-

tion. It will therefore be observed that patrol inspectors, naturalization examiners and all employees other than clerks and stenographers may be utilized by the Immigration Service to conduct hearings.

The Attorney General's Manual on the Administrative Procedure Act (1947) at p. 72 acknowledges:

> "A statutory provision which merely provides for the conduct of hearings by any officers or employees the agency may designate, does not come within the exceptions so as to authorize the agency to dispense with hearing examiners appointed in accordance with section 11. H. R. Rep. p. 34 (Sen. Doc. p. 268)."

In testimony before the Senate Subcommittee on Immigration on S. 2755 (June 9, 1948), Ashley Sellers representing the American Bar Association pointed out that the exemption of Section 7 contemplated the appointment of a special type of responsible official rather than employees generally (pp. 93 *et seq*).

Under its regulations the Immigration Service may designate border patrol men as immigrant inspectors to conduct hearings. They may select officials outside the government to so act as they did in the *Bridges* case. Any person, in or out of the government, may be designated an immigrant inspector to sit on a Board of Special Inquiry. 8 C. F. R. 60.29(c). Immigrant inspectors need not be lawyers, need not be trained in the law or in immigration matters in order to be designated as a hearing officer. If hearings conducted by immigration inspectors fall within the exemption of 5 U. S. C. 1006, then a loophole has been provided for the examiner system.

Finally, attention should be called to the contention below by the government and the view adopted by the *Azzollini* case that the Section 7 exemption completely frees the Immigration Service from all provisions of the Administrative Procedure Act and in particular from Section 5 (5 U. S. C.

1004). This is directly contrary to the view expressed by the Attorney General in his manual *supra* at p. 72 wherein it is stated:

> "Generally, whoever presides at the hearing (whether an examiner appointed pursuant to section 11, a member of the agency or a special statutory board of hearing officer) is subject to the remaining provisions of the Act. Sen. Rep. p. 21; H. R. Rep. p. 34 (Sen. Doc. pp. 207, 268)."

The Senate Judiciary Committee print of June 1945 explained Section 7(a) of the Administrative Procedure Act as follows:

> "This subsection contains merely formal provisions with reference to hearing officers. The problem of their selection is presented in section 11 and the comments thereon." [Senate Document 248, *supra*, at p. 29.]

In the Senate Committee Report of 1945, p. 21 (S. Doc. 248, 79th Cong., p. 207) it is stated:

> "Whoever presides is subject to the remaining provisions of the bill."

And again in House Committee Report, 1946, pp. 34-35 (S. Doc. 248, 79th Cong., pp. 268-269) it is repeated with reference to all presiding officers set forth in Section 7(a):

> "Those who so preside are subject to the remaining provisions of the bill."

If it were intended to exempt the specially designated officers mentioned in 7(a) from all the provisions of the Administrative Procedure Act, the exemption would have been set forth in Section 2 (5 U. S. C. 1003) where general exemptions are provided.

Section 7(a) provides that nothing in the Act shall supersede the *conduct* of proceedings before officers designated

by statute. The *conduct* of deportation proceedings is not provided by statute. There is therefore nothing in the Immigration statutes to be superseded. The requirements of the Administrative Procedure Act do not supersede the type of hearing officers designated by statute. Section 7a merely relates to hearing officers and cannot grant the Immigration Service a blanket exemption from the remaining provisions of the Act—an exemption which they have been seeking by legislative amendment.

If is therefore submitted that if the Section 7 exemption applies to deportation, the Immigration Service would be freed of the requirements of Section 11 (independent hearing officers) but not from Section 5 (separation of functions).

Conclusion

Deportation is a drastic measure and at times the equivalent of banishment or exile. *Fong Haw Tan* v. *Phelan*, 68 Sup. Ct. 374 (1948). Is it too much to expect that in such proceedings the quasi-judicial hearing officer be independent and divorced from investigatory and prosecution functions?

The decision in this case will not only affect aliens like plaintiff who entered comparatively recently but also those who have been here for almost all their lives.

The purpose of the Administrative Procedure Act was to bring fair hearing procedure into the administrative process. The requirements of separation of functions and independent hearing examiners were reforms advocated for some time in the exclusion and deportation of aliens.

Van Vleck, The Administrative Control of Aliens (1932), pp. 247, 46, 67;

The Secretary of Labor's Committee on Administrative Procedure, supra;

5 *National Commission on Law Observance and Enforcement* (1931);

Wasserman, The Challenge of Our Immigration Laws, Journal of Legal and Political Sociology (Fall 1944) p. 115.

Clark, Deportation of Aliens (1931).

This case raises for the first time in this court, the applicability of the Administrative Procedure Act to deportation. It is submitted that the Act applies to that process and that this petition for review be granted and a writ of certiorari issued.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 154

154

WONG YANG SUNG,

Petitioner,

vs.

J. HOWARD McGRATH, ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, UNITED STATES COMMISSIONER OF IMMIGRATION AND NATURALIZATION,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 154

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J. HOWARD McGRATH, ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, UNITED STATES COMMISSIONER OF IMMIGRATION AND NATURALIZATION,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

In a *per curiam* opinion the Court of Appeals affirmed the order below discharging petitioner's writ of *habeas corpus* (R. 8). The opinion of the District Court is reported at 80 F. Supp. 235.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented

The basic issue presented in this case is whether an alien is entitled to a fair hearing in a deportation case—whether he may be deported after a hearing before a layman who acts as prosecutor and judge—or whether the Administrative Procedure Act, 5 U. S. C. 1004, 1010 prescribes that such hearing be held before an independent hearing officer who is not buried in the prosecuting and investigatory phases of the immigration process.

Specifically, the issues are:

1. Whether the hearing accorded an alien in a deportation case is a hearing "required by statute" and as such subject to the provisions of the Administrative Procedure Act (5 U. S. C. 1004-c) which require that hearing officers shall not be subject to the supervision of officials engaged in investigative or prosecuting functions.

2. Whether hearing officers in deportation proceedings are required to be appointed pursuant to the Administrative Procedure Act (5 U. S. C. 1010) and assigned to hearings in rotation.

3. Whether deportation proceedings are exempt from the terms of the Administrative Procedure Act by reason of the fact that they are "specified classes of proceedings . . . before . . . officers specially provided for by or designated pursuant to statute." (5 U. S. C. 1006).

Scope of Issues

The decision on the issues presented herein will not only affect the life and destiny of the petitioner who entered

the United States in 1946 (R. 2) but it will also control the type of hearing accorded to an alien resident in the United States for 35 years, married to an American citizen and the father of an American child (See *Potash* v. *Clark*, #366 Supreme Court, October, 1949). The decision herein will control hearings before the Post Office Department in mail fraud cases (*Bersoff et al.* v. *Donaldson*, 174 Fed. (2d) 494 (1949)) and hearings involving public convenience and necessity before the Interstate Commerce Commission. Also affected will be hearings of the Federal Communications Commission on the modification *vel non* of an outstanding licensee's facilities and proceedings of the Securities and Exchange Commission revoking an exemption (See Brief *Amicus Curiae* for Riss & Company, Inc.)

Statutes Involved

Section 16 of the Immigration Act of February 5, 1917, as amended, 39 Stat. 885, 8 U. S. C. 152 provides:

> ". . . The inspection . . . of aliens, including those seeking admission or readmission to or the privilege of passing through or residing in the United States, and the examination of aliens arrested within the United States under this section, shall be conducted by immigrant inspectors, except as hereinafter provided in regard to boards of special inquiry. . . . Said inspectors shall have the power to administer oaths and to take and consider evidence touching the right of any alien to enter, reenter, pass through, or reside in the United States, and, where such action may be necessary, to make a written record of such evidence."

Section 19 of the Immigration Act of February 5, 1917, as amended, 39 Stat. 889, 8 U. S. C. 155 provides:

> "At any time within five years after entry, any alien who at the time of entry was a member of one or

more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this chapter . . . shall, upon the warrant of the Attorney General, be taken into custody and deported. . . . In every case where any person is ordered deported from the United States under the provisions of this chapter, or of any law or treaty, the decision of the Attorney General shall be final."

Section 5 of the Administrative Procedure Act of June 11, 1946 (5 U. S. C. 1004) provides:

"In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, . . .

(c) *Authority and function of officers and employees.* The same officers who preside at the reception of evidence . . . shall make the recommended or initial decision . . . Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party or any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 1007 of this title except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency."

Section 7 of the Administrative Procedure Act (5 U. S. C. 1006) provides:

"In hearings which section 1003 or 1004 of this title requires to be conducted pursuant to this section——

(a) There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this chapter; but nothing in this chapter shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute."

Section 11 of the Administrative Procedure Act (5 U. S. C. 1010) provides:

"Subject to the civil-service and other laws to the extent not inconsistent with this chapter, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 1006 and 1007 of this title, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with sections 661-663, 664-669, 670-672, 673, and 674 of this title, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 667 of this title, and the provisions of section 669 of this title, shall not be applicable."

Statement

Petitioner is a citizen of China who entered the United States legally and has resided in the United States since his arrival on April 21, 1946. He was arrested in deportation proceedings on October 14, 1947, on a warrant issued the preceding day. Deportation proceedings were conducted in Washington, D. C., on December 11, 1947 and January 29, 1948, before a single immigrant inspector, Manuel E. Boteilho, a layman, who presented the government's case and also presided in a quasi-judicial capacity. Mr. Boteilho was subject to the supervision of the Officer-in-Charge of the Washington sub-office of the Immigration Service and a District Director who were and are engaged in the investigation and prosecution of aliens illegally in the United States.

Immediately following the hearing, Mr. Boteilho dictated on the administrative record findings of fact and conclusions of law recommending deportation on the ground that petitioner remained in the United States after legal admission for a period longer than permitted under the Immigration laws. (8 U. S. C. 214.) An order of deportation was entered and on appeal to the Board of Immigration Appeals the order was affirmed.

The petition for *habeas corpus* was filed on July 23, 1948, alleging that petitioner had been arrested, accorded a hearing, and ordered deported at the conclusion of said hearing. (R. 2). Petitioner asserted that his purported hearing was in conflict with the provisions of the Administrative Procedure Act in that:

> "(a) The presiding officer was responsible to and subject to the supervision of the respondents, their officers, employees, or agents who are engaged in the performance of investigation and prosecuting functions;

(b) The presiding officer was not qualified as a competent examiner subject to the Civil Service and other laws of the United States;

(c) The presiding officer was not assigned to the hearing in rotation."

It was alleged that the aforesaid violations rendered the hearing and proceeding void and that petitioner was therefore illegally detained. (R. 3). The answer and return of respondents did not deny the allegations of non-compliance with the Administrative Procedure Act but merely alleged that petitioner was held pursuant to a commitment issued by the Department of Justice (R. 6). On July 29, 1948, District Judge Holtzoff discharged the writ on the ground that deportation hearings were exempt from the Administrative Procedure Act under 5 U. S. C. 1006(a). In his opinion (80 F. Supp. 235) he states:

"Section 7 of the Administrative Procedure Act, U. S. Code, Title 5, Section 1006, on which the petitioner relies, requires statutory hearings to be conducted before an examiner appointed pursuant to the provisions of the Act. The hearing in this case, as is customary in all Immigration deportation proceedings, was conducted by an Inspector or Board of Inspectors of the Immigration Service. *If the requirements of the Administrative Procedure Act are applicable, the hearing was not properly conducted.*

"The Court, however, feels that the Administrative Procedure Act does not apply to hearings under the Immigration Laws, in the light of the following provision of Section (a) of Section 7 of the Administrative Procedure Act, and I quote:

'Nothing in this chapter shall be deemed to supersede the conduct of specific classes of proceedings in whole or in part by or before boards or other officers specially provided for by, or designated pursuant to statute.'

"Section 152 of Title 8 of the Immigration Law, which governs the authority and powers of Immigration Inspectors, provides that said Inspectors shall have power to administer oaths and to take and consider evidence touching the right of any alien to enter, re-enter, pass through or reside in the United States, and where such action may be necessary, make a written record of such evidence. In the light of this provision it seems to the Court that deportation proceedings are within the exception specially specified in Section 7(a) of the Administrative Procedure Act, because it is 'a specific class of proceeding before officers specially provided for by, or designated pursuant to statute.'

In the light of this, the Court feels that immigration deportation hearings may be properly conducted by Immigration Inspectors and that the requirement as to hearing before specially appointed examiners as provided by the Administrative Procedure Act, does not apply." (Italics supplied.)

Although Judge Holtzoff's findings and order recited that evidence was taken in open court on the return date (R. 6-7) no evidence was in fact adduced and accordingly the record contains no transcript of any evidence.

On April 4, 1949, the Court of Appeals for the District of Columbia affirmed *per curiam* (R. 8).

Specification of Errors

The courts below erred in holding that:

1. Petitioner was not entitled to a hearing in conformity with Sections 5 and 11 of the Administrative Procedure Act (5 U. S. C. 1004, 1010) before independent hearing examiners assigned in rotation and not subject to the supervision or direction of officers engaged in the performance of investigative functions.

2. Section 7 of the Administrative Procedure Act (5 U. S. C. 1006) excepted deportation proceedings from the requirements of Sections 5 and 11 of the said Act.

3. Petitioner was not unlawfully detained and that he was not entitled to release from custody of respondents.

Argument

Petitioner contends that the deportation proceeding herein was unfair because it violated Sections 5 and 11 of the Administrative Procedure Act (5 U. S. C. 1004, 1010) which requires separation of functions and independent hearing examiners. Noncompliance with the applicable provisions of the Administrative Procedure Act was not denied by respondents in the courts below. Petitioner asserts that Sections 5 and 11 of the Administrative Procedure Act apply to deportation proceedings because:

I. Deportation hearings are required by statute as a matter of interpretation. The government's distinction under 5 U. S. C. 1004 between statutes which explicitly require a hearing and those which do by reason of constitutional interpretation is unsound and is not founded upon the correct construction of the statute nor the legislative history of the Administrative Procedure Act.

II. Section 7(a) (5 U. S. C. 1006(a)) does not remove deportation hearings from the operation of Section 5 (c) (5 U. S. C. 1004(c)) of the Administrative Procedure Act.

III. The hearing violated Section 11 (5 U. S. C. 1010) of the Administrative Procedure Act governing the appointment and tenure of hearing examiners. Section 7(a) does not remove deportation hearings from the operation of Section 11. Section 7(a) requires that hearing officers be specifically designated pursuant to statute to conduct

the proceedings involved and that the hearing officer be specially qualified.

(A) Deportation proceedings are not specially provided for before Immigrant inspectors. Section 16 of the Immigration Act of 1917 (8 U. S. C. 152) does not relate to the conduct of deportation hearings but merely to the investigation of aliens.

(B) Immigrant inspectors do not possess the qualifications contemplated by Section 7(a) (5 U. S. C. 1006 (a)).

(A)

The Deportation Process

In evaluating the deportation process, Professor Chaffee suggests that following criteria be observed. He states:

> "The most important question with any legislation which affects human happiness is, what kind of men administer its provisions? Are they a judge, a jury, a government official, a secret council, a star chamber? . . . An alien must expect to be expelled, if he furnishes legal cause, just as he must expect to be punished for an offense, but in each case we should be proud as citizens of a free land to furnish him the best legal machinery we can devise to ascertain whether or not the ground for governmental action really exists." (Free Speech in the United States, 1942, pp. 198, 200).

1. *The Qualifications for Presiding Inspectors.*

The immigrant inspector assigned to conduct a deportation hearing is known as a presiding inspector. 8 C. F. R. 150.6(b). He is not required to be an attorney at law, nor to have any trial, quasi-judicial or educational background. The only requirement is investigatory or interviewing experience. See *infra* p. 36.

2. *The Legal Machinery for Deportation.*

The initial step in a deportation case is the investigation of an alien by an immigrant inspector. The alien is questioned and asked to sign a sworn statement without any right to representation by counsel. 8 C. F. R. 150.1. This is followed by the issuance of a warrant of arrest, and incarceration unless there is an administrative grant of bail. 8 C. F. R. 150.5. The formal hearing follows.

Although provision is made for immigration hearings at which there may be an examining inspector and a presiding inspector, (8 C. F. R. 150.6(b) and (n)) such practice is not mandatory and except in rare instances one inspector presides as prosecutor and judge at a deportation hearing. This single inspector who presides at the hearing is also obligated by regulation to "cross examine the alien's witnesses and present such evidence as is necessary to support the charges in the warrant of arrest". 8 C. F. R. 150.6(b). Thus the presiding inspector is at one and the same time prosecutor and judge.

The presiding inspector may be an investigator one day and a quasi-judicial officer the next. He is not precluded from acting as investigator in other cases. He is only precluded from so acting in the same case. 8 C. F. R. 150.6 (b). He is subject to the ~~immediate~~ jurisdiction and control of a District Director who is charged with the duty of investigations under the Immigration Laws (8 C. F. R. 60.25), and authorized to direct the arrest of aliens illegally in the United States. 8 C. F. R. 150.3.

The procedure followed by the presiding inspector at a deportation hearing is in part prescribed by regulation. 8 C. F. R. 150.6. He is required to prepare a summary of the evidence and proposed findings of fact, conclusion of law, and a proposed order. 8 C. F. R. 150.7. In making these determinations, the presiding inspector's evalua-

tion of the facts, exercise of discretion and conclusions of law are controlled by the following:

1. A confidential file or confidential reports which are kept concerning every alien and which are available only to employees of the Immigration Service. These confidential reports follow the record of the case when it is transmitted to the Commissioner and the Board of Immigration Appeals. They are not made available to counsel for the alien.

2. A volume of several hundred pages of secret and confidential directives known as "Operation Instructions."

3. A loose leaf book of several hundred pages published for the confidential use of the Immigration Service, and known as the "Immigration Manual."

Thus controlled, the presiding inspector's findings and recommendations for or against deportation are served on the alien and submitted in some cases to the District Director for the entry of an order, and in other cases through the District Director to the Commissioner of Immigration. 8 C. F. R. 150.11(e), 150.9. Appeal may be taken from the Commissioner's order to the Board of Immigration Appeals. 8 C. F. R. 90.3.

It therefore appears that in practice a deportation order is proposed by the presiding inspector and approved by the Commissioner or the Board of Immigration Appeals upon consideration of confidential material with which the alien has never been confronted and which is not a part of the record.

This is the star-chamber procedure by means of which an alien is "forcibly taken away from home, and family, and friends, and business, and property, and sent across the ocean to a distant land." (*Fong Yue Ting* v. *U. S.* 149 U. S. 740).*

* This court recently acknowledged that deportation can be the equivalent of banishment or exile. *Delgadillo* v. *Carmichael*, 332 U.S. 388, 391; *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10.

(B)

Non-Compliance With Administrative Procedure Act

Section 5 of the Administrative Procedure Act (5 U.S.C. 1004) requires that in every case of adjudication required by statute, hearing officers shall not be responsible to officials engaged in investigatory functions and precludes such hearing officers from participating in investigatory or prosecuting functions in the same or a factually related case. Section 7(a) of the Administrative Procedure Act requires the appointment of examiners pursuant to Section 11 of that Act but this provision is not to be construed to supersede the conduct of specified classes of proceedings before officers specially provided for pursuant to statute.

1. *Non-Compliance with 5 U.S.C. 1004 and 1010.*

The Administrative Procedure Act requires that: "The separation of functions must be reflected in the rules of organization and procedure published pursuant to section 3(a)" of the Administrative Procedure Act. (P. 262 Legislative History of the Administrative Procedure Act, Senate Document 248, 79th Congress).

There is no dispute that the Immigration Service failed to comply with this mandate of the Administrative Procedure Act. Commissioner Carusi in an article appearing in the Monthly Review of the Immigration and Naturalization Service for February, 1947 acknowledges that the Immigration Service is an agency within the Act and admits that:

> "in most cases there is not a complete separation of functions, since the presiding inspector generally conducts the entire hearing and recommends the decision." (p. 103.)

It is equally clear and not disputed that the Immigration Service has not selected its presiding officers in conformity

with Section 11 of the Administrative Procedure Act. 5 U.S.C. 1010. Judge Holtzoff so ruled. (80 F. Supp. 235).

By its failure to deny non-compliance with the Administrative Procedure Act in its answer, the government has admitted petitioner's charges.

In contravention of Sections 5 and 11 of the Administrative Procedure Act, 5 U. S. C. 1004, 1010, deportation hearing officers:

1. Are responsible to or subject to the supervision or direction of officers engaged in the performance of investigative functions.

2. Engage in the performance of prosecuting functions and at the same time participate or advise in decisions in the same case.

3. Engage in investigative functions and participate or advise in decisions in factually related cases.

4. Perform duties inconsistent with their responsibilities as examiners.

5. Are not assigned to cases in rotation.

6. Do not receive compensation prescribed by the Civil Service Commission independently of recommendations or ratings of the Immigration Service.

If deportation proceedings are subject to the Administrative Procedure Act then the instant hearing was unfair and illegal.

In *Bridges* v. *Wixon*, 326 U. S. 135, this Court stated:

> "It was assumed in *Bilokumsky* v. *Tod*, 263 U. S. 149, 155 that 'one under investigation with a view to deportation is legally entitled to insist upon the observance of rules promulgated by the Secretary pursuant to law.' We adhere to that principle. . . . Here the liberty of an individual is at stake. . . . We are dealing here with procedural requirements prescribed for

> the protection of the alien. Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in the land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."

In the instant case the procedural violation is not one of administrative regulation like the *Bridges* case, but of an affirmative Congressional mandate.

Sections 5 and 11 of the Administrative Procedure Act require an independent hearing officer, detached from the investigative and prosecuting functions of the Immigration Service and responsible solely to the Civil Service Commission. An officer not so detached and appointed as required is disqualified. If it is found that the provisions of 5 U.S.C. 1004 or 5 U.S.C. 1010 have been violated, then the hearing was conducted before a disqualified officer and it, as well as the deportation order based thereon, was of no effect. 5 U.S.C. 1008, Senate Document 248 p. 274.

2. *Basis of Non-Compliance.*

Section 5 of the Administrative Procedure Act applies to adjudications "required by statute to be determined after opportunity for an agency hearing."

The government appears to be unable to decide whether or not deportation hearings are statutory.

On the ground that the deportation statute (Section 19 of the Immigration Act of 1917) "does not require an adjudication 'to be determined on the record after opportunity for an agency hearing' it was concluded by the Immigration and Naturalization Service, with the approval of the Department of Justice, that the adjudication requirements of the Administrative Procedure Act were not intended by Con-

gress to apply to the immigration statutes providing for deportation of aliens unlawfully in the United States" (*House Report 2140, 80th Congress,* 2d Session).

In testimony before the Senate Subcommittee on Immigration on S. 2755, 80th Congress, on June 9, 1948, the General Counsel of the Immigration Service, the Assistant Commissioner of Immigration Service and the Attorney General's office urged the enactment of a bill to exempt the Immigration Services from the provisions of the Administrative Procedure Act. These witnesses explained that deportation hearings were not being conformed to the Administrative Procedure Act because the hearing was one required by law and not by statute. (Pp. 4-6, 11-12, 21-22 of Testimony on file with Senate Immigration Subcommittee.) David Reich, representing the Attorney General, stated as follows (at p. 12):

> "In deportation proceedings, as has been stated by Mr. Savoretti (Assistant Commissioner of Immigration) and Mr. Winings (General Counsel), there is no requirement by statute for a hearing."

This was the contemporaneous administrative construction given to the Administrative Procedure Act by the Attorney General and the Immigration Service.

Nevertheless in the instant case the government urged and District Judge Holtzoff found that deportation was a proceeding before an officer "specially provided for or designated pursuant to statute." This ruling could only be reached on the assumption that deportation hearings were statutory—otherwise the exemption of 5 U.S.C. 1006 would be inapplicable. (The correctness of this ruling will be discussed more fully in Point III). In its brief in the Court of Appeals (p. 7) the government declared:

> "It is plain from the wording of the statute itself (8 U. S. C. 152) that the examination and *hearing*,

granted aliens arrested under the Immigration Act shall *by virtue of the express provisions of the Immigration Act* be conducted by immigrant inspectors."

At the same time, the Government also contended that the requirement of a hearing in deportation "is one which has evolved by judicial decision applying customary concepts of due process. Thus, the hearing is one 'required by law' rather than one 'required by statute'" (p. 13, Brief in Court of Appeals).

I

Deportation Hearings Are Subject to the Limitations of 5 U.S.C. 1004(c) Requiring Separation of Functions

(A) *Deportation hearings are required by statute.*

The immigration statutes do not in specific terms set forth the hearing procedure to be followed in a deportation case. Section 19 of the Immigration Act of 1917 (8 U.S.C. 155) merely states that an alien shall be taken into custody and deported. However the same statute specifically recognizes that hearings are required. Section 20 of the Immigration Act of 1917 (8 U.S.C. 156) provides for the release of an alien on bond conditioned that "such alien shall be produced when required for a hearing or hearings in regard to the charge upon which he has been taken into custody."

It is the contention of petitioner that deportation hearings are subject to Sections 5 of the Administrative Procedure Act (5 U.S.C. 1004) because the hearings are required by statute as the term is used in that Act. The Supreme Court has held that the immigration statutes are to be construed to require a hearing on the record to adjudicate whether an alien is deportable.

Japanese Immigrant Case, 189 U. S. 86;

Kwock Jan Fat v. *White*, 253 U. S. 454;
Bridges v. *Wixon*, 326 U. S. 135.

This construction of the statute follows both the requirement of due process and the *Congressional intent*. In the *Japanese Immigrant* case, *supra*, at 100, 101, the court said:

> "But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution. . . . Therefore, it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized.
>
> "*This is the reasonable construction of the acts of Congress here in question.* . . . In the case of all acts of Congress, such interpretation ought to be adopted as, without doing violence to the import of the words used, will bring them into harmony with the Constitution." (Italics supplied.)

In *Bridges* v. *Wixon*, *supra*, the court stated:

> "As construed and applied in this case, *the statute calls* for the deportation of Harry Bridges after a fair hearing" (at p. 160).

In *Low Wah Suey* v. *Backus*, 225 U. S. 460, 472 in considering the Deportation statute of 1907, which was similar to the act now before this Court, it was said:

> "Considering the summary character of the *hearing provided by statute* and the rights given to counsel in

the rules prescribed, we are not prepared to say that the rules are so arbitrary and so manifestly intended to deprive the alien of a fair though summary hearing as to be beyond the power of the Secretary of Commerce and Labor under the authority of the statute."

In *American Power Co.* v. *S. E. C.*, 329 U. S. 90, the Supreme Court stated with reference to the Public Utility Holding Company Act:

> "That the statute does not expressly insist upon what in fact has been given the security holders is without constitutional relevance under the circumstances. Wherever possible, statutes must be interpreted in accordance with constitutional principles. Here, in the absence of definite contrary indications, it is fair to assume that Congress desired sec. 11(b) (2) be lawfully executed by giving appropriate notice and opportunity for hearing to all those constitutionally entitled thereto. See the Japanese Immigrant Case, 189 U. S. 86, 100-101 (at p. 108)".

In *Eisler* v. *Clark*, 77 F. Supp. 610, Judge Goldsborough held that Section 11 of the Administrative Procedure Act applied to deportation, stating:

> "The courts have read due process into the Act, and due process means a hearing, and . . . therefore hearing is an integral part of *the Deportation Act;* in fact, just as much as if the Act itself in words stated that a hearing should be held."

(B) *There is no distinction under Section 5 of the Administrative Procedure Act between statutes explicitly requiring a hearing and those requiring hearing by interpretation.*

As noted above, Section 20 of the Immigration Act of 1917 (8 U. S. C. 156) explicitly recognizes that a hearing is to be held in deportation proceedings. Nevertheless, it has been the government's position that the statute must ex-

plicitly require a hearing to be subject to Section 5 of the Administrative Procedure Act.

1. If the deportation statutes did not require a hearing they would be unconstitutional. *Japanese Immigrant* case, *supra*. It would seem strange that Congress should require the application of the Administrative Procedure Act to cases where a statute *in haec verba* required a hearing but not to cases where constitutional interpretation of the statute requires a hearing. Respect for the law does not thrive upon such capricious interpretations. *Delgadillo* v. *Carmichael*, 323 U. S. 388, 391.

The word "statute" when used in a federal enactment includes "Constitution."

A. F. L. v. *Watson*, 327 U. S. 582;
Phillips v. *U. S.*, 312 U. S. 246;
Hamilton v. *University of California*, 293 U. S. 245;
King Mfg. Co. v. *Augusta*, 277 U. S. 100, 103.

2. Significantly the Attorney General's Manual on the Administrative Procedure Act states that a statutory requirement of determination on the record may be implied from judicial interpretation (pp. 42, 43.) Section 5 of the Administrative Procedure Act covers adjudications "required by statute to be determined on the record after opportunity for an agency hearing." The words "required by statute" precede the words "on the record" and "agency hearing" and obviously if the requirement of a record may be implied by statutory interpretation so may the requirement for a hearing. There is nothing in the legislative history to support the conclusion that a differentiation was intended. (See Hearings on S. 674, 675, 918, 77th Congress, 1st Sess. p. 1456 which indicates that the two requirements of (1) agency hearing and (2) the record were intended to supplement each other.)

3. Where the framers of the Administrative Procedure Act intended to require express provisions in a statute, they employed language to accomplish such purpose. Thus in 5 U. S. C. 1009(c) they provided:

> "Except as otherwise *expressly required by statute*, agency action otherwise final shall be final for the purposes of this subsection." See *United States* v. *Cooper Corporation*, 312 U. S. 600 (1941).

4. The legislative history of the Administrative Procedure Act confirms the fact that Congress intended to cover deportation hearings, *i. e.* hearings required by statute although not required by the express terms of the statute.

In considering the legislative history the following conclusion is reached in 49 Columbia Law Review 75 (1949):

> "Although the Immigration Acts do not in terms so provide, the requirement of a hearing in deportation cases has been read into them by the courts to satisfy the constitutional requisites of due process of law. It has also been stated that the decision to issue a deportation order must be rendered on the record. Therefore, the applicability to deportation of the adjudication sections in question depends on whether the phrase 'by statute' as employed in the Act means *explicitly by statute* or *by statute as construed by the courts*.
>
> "Examination of the legislative history of the phrase reveals some disagreement as to its proper interpretation. Contrary to the position taken by the Attorney General that the strict construction was the one intended, the House Committee on the Judiciary stated: 'A statute may, in terms, require (an) . . . order to be made upon the record of a hearing, or in the usual case be interpreted as manifesting a Congressional intention so to require.'" [Citing H. R. Rep. No. 1980, 79th Cong. 2 Sess. 51 n. 9 (1946).]
>
> See also: Senate Document 248, 79th Congress 1st Sess. p. 285 note 9.

By this language of the House Judiciary Committee it appears clear that Congress not only included under 5 U. S. C. 1004 hearings required by statute *in haec verba* but also hearings which were required as a matter of statutory construction. It would therefore appear to be plain that deportation hearings are under the Administrative Procedure Act and particularly within section 5. The hearing herein was therefore in violation of law.

(C) *Section 5 of the Administrative Procedure Act does not exclude deportation hearings but only exempts non-statutory hearings granted as a matter of grace.*

For more than ten years prior to the passage of the Administrative Procedure Act legislation was under consideration to prescribe fair hearing procedures before administrative agencies. In 1939 the President approved the appointment of the Attorney General's Committee on Administrative Procedure. This committee studied the various administrative agencies of the government including the Immigration and Naturalization Service. (Senate Document No. 248, 79th Congress 2nd Session, p. 245).

The study of the Immigration Service is contained in a mimeographed pamphlet prepared in 1940 by Professors Marshal Dimock of the University of Chicago, Henry Hart of Harvard and John McIntire of George Washington. This pamphlet entitled "The Secretary of Labor's Committee on Administrative Procedure, (The Immigration and Naturalization Service)" stated and recommended with reference to deportation proceedings at pp. 78-81:

> "The right to an unbiased tribunal is one of the most obvious and elementary aspects of the basic right to a fair hearing. . . . We strongly recommend that the Department follow the example of other federal agencies in encouraging independence and detachment in presiding inspectors. . . . We recommend that the

> presiding inspectors be relieved of their present duties of presenting the case against aliens and be confined entirely to the duties customary for a judge. . . . We fully appreciate the adoption of this recommendation would add somewhat to the cost of administration. But we do not think the added cost would be so serious that it might be regarded as prohibitive. . . . We are deeply persuaded that fairness and wisdom alike require the expenditure, whatever it might be . . ."

During the 77th Congress, First Session, several administrative procedure bills were introduced. Two such bills, S. 674 and S. 918 required administrative agencies to grant hearings where the law previously prescribed none.

Various agencies including the Immigration Service objected to the bill on this ground. The Federal Security Agency, the Treasury, and the Federal Deposit Insurance Corporation were opposed to the requirement of *formal hearing procedures* to cases which under the law were and are now conducted informally and in which hearings are not legally required. (Senate Hearings on S. 674, 675, 918, 77th Congress, First Session, pp. 1390, 251, 148-149, 791-792.)

The Immigration Service approved the application of the independent hearing examiner provision of S. 675 to deportation and exclusion cases.

Major Schofield, head of the Immigration Service, testified on April 30, 1941 before a Senate Judiciary Sub-Committee as follows with reference to S. 675:

> "Through section 301, it applies its hearing-commissioner system only to cases where by law formal procedures are now required. In other words, as we read it, its requirements apply only to deportation and exclusion cases. . . . We think that the hearing-commissioner system would improve our present procedures to a considerable extent without stultifying the administration of the laws. . . . Now we use inspectors to hear cases who are engaged in other activi-

> ties when not acting as presiding officers. Both S. 675 and S. 674 would prevent this and would require a staff of hearing commissioners devoted solely to hearing and deciding cases." (pp. 571, 575, Hearings on S. 674, 675, 918, 77th Cong. 1st Sess.)

He objected however to S. 674 and 918 insofar as those bills required "formal adjudicatory procedures for the hearing and decision of cases" other than deportation or exclusion. (Hearings on S. 674, 675, 918, 77th Congress, First Session, pp. 564-567.)

In a statement submitted by Acting Attorney General Biddle, it was suggested that S.675 be amended so that the bill would apply to hearings required by statute or constitution instead of to hearings required by law. He clearly indicated that the purpose of the amendment was to exclude nonstatutory hearings granted voluntarily by an agency and established solely by regulation. He stated:

> "In some cases certain agencies have ex gratia by regulations imposed upon themselves requirements of formal procedures though the applicable statute makes no such requirement. In order to exclude the possibility that such procedures come within Title III, the amendment is desirable." (Hearings on S.674, 675, 918 *supra*, p. 1456.)

The Administrative Procedure Act is confined to hearings "required by statute" and not to hearings "required by statute or constitution" as suggested by Mr. Biddle. The words "or constitution" were unnecessary. The constitution does not require a hearing in deportation cases. It is the statute as construed by the constitution which does.

The Final Report of the Attorney General's Committee on Administrative Procedure in Government Agencies (Senate Document 8, 77th Congress 1st Session, pp. 55, 56) recommended an independent hearing examiner system in government agencies and the separation of the adjudicating function from other administrative activities. The

minority of this Committee agreed with the principle of separation of functions but desired more sweeping exceptions. It specifically recommended an exemption in the adjudicatory procedural requirements in connection with the "admission or control of aliens." (Senate Hearings on S. 674, etc. pp. 1389-1390). This exemption was never adopted nor were attempts to secure immigration exemptions subsequent to the passage of the Administrative Procedure Act successful.

During the 80th Congress the Immigration Service actively sought the enactment of a bill to specifically exempt it from the application of the Administrative Procedure Act (H. R. 6652 and S.2755). Congress declined to approve this legislation. A bill is now pending in the 81st Congress to accomplish the same end (Section 5 of H. R. 10).

When the Administrative Procedure Act was enacted it contained no exemption for the Immigration Service. Section 2 of the Act, 5 U. S. C. 1001, excluded war functions, Section 5 (5 U. S. C. 1004) excluded military, naval and foreign affairs functions and other enumerated classes. The suggested exemption for the "admission or control of aliens" was therefore specifically rejected. The application of the Administrative Procedure Act to deportation proceedings, originally advocated by the Immigration Service itself and the requirement for independent examiners advocated by the Secretary of Labor's Committee were accordingly approved when the Administrative Procedure Act, Public Law 404, 79th Congress, was signed by the President.

Sub-Committee Chairman Francis E. Walter in charge of the bill in the House also indicated that the distinction was between statutory and nonstatutory hearings. He states:

> "The requirements of section 5 are thus limited to cases in which statutes otherwise require a hearing,

> because, *where statutes do not require an agency hearing*, the parties affected are entitled to try out the pertinent facts in court . . . The right of trial de novo in judicial cases where agencies do not proceed upon a statutory hearing will also be discussed in connection with section 10e." 32 *American Bar Association Journal*, 377, 380.

We submit that it appears from the foregoing that Congress did not intend to exempt deportation hearings, that it has specifically declined to entertain such exemption, that Congress did not intend to distinguish under 5 U. S. C. 1004 between hearings required by express statute and those required by statutory interpretation. The Immigration Service and the Department of Justice and others only objected to the requirements of the Administrative Procedure Act where statutes as expressly worded or as interpreted did not require hearings.

The distinction contemplated by 5 U. S. C. 1004 was merely between statutory hearings and nonstatutory hearings granted as a matter of grace. Section 5 of the Administrative Procedure Act is applicable to deportation proceedings and its provisions have been violated.

II

Section 7(a) of the Administrative Procedure Act Does Not Exempt Deportation Hearings from the Requirements of Section 5(c).

Section 5 of the Administrative Procedure Act requires that in cases of adjudications *required by statute* hearings shall be conducted in conformity with Section 7 of the Administrative Procedure Act. (5 U. S. C. 1004b).

Section 5(c) of the Act requires separation of investigatory and adjudicatory functions. It exempts the top men in any governmental organization by excepting "the agency or any member or members of the body comprising the agency." (Senate Document 248, pp. 262, 361).

In his Manual, on the Administrative Procedure Act, the Attorney General states at pp. 71-72:

> "The requirements of section 7 are closely integrated with those of section 5(c) (as to certain types of adjudication) and 8 . . . The first sentence of section 7(a) provides that 'There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises an agency or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or in part before boards or other officers specially provided for or designated pursuant to statute . . . *The last clause of the sentence is designed to permit agencies to continue to utilize hearing officers or boards 'specially provided for by or designated pursuant to statute' . . . Generally, whoever presides at the hearing (whether an examiner pursuant to section 11, a member of the agency or a special statutory board of hearing officer) is subject to the remaining provisions of the Act.* Sen. Rep. p. 21; H. R. p. 34 (Sen. Doc. pp. 207, 268). However, where a member of the agency acts as presiding officer, the exception in the last clause of section 5(c) applies, with the result that he is not disqualified, as an examiner would be, by previous participation in the investigation of the case." (Italics supplied).

Section 7(a) was not intended to cancel or reduce the application of Section 5(c). On the contrary it supplements it.

> "As heretofore stated in connection with sections 4 and 5, the bill requires no hearings unless other statutes contain such a requirement in particular cases of either rule making or adjudication. This section 7, therefore, is merely supplementary to sections 4 or 5 in the relevant cases." *Senate Document* 248 p. 206. See also: pp. 227, 252, 268.

Deportation proceedings are within the exemption of Section 7(a) of the Administrative Procedure Act only

on the assumption that such hearings are required by statute before specially designated officials of the Immigration Service. We do not believe that immigrant inspectors are such officials. (See *infra*, Point III). Nevertheless, it is clear whether or not immigrant inspectors are specially designated pursuant to statute to conduct deportation hearings, that they are subject to the prohibitions of Section 5 (c). They are not the agency or a member of the agency (5 U. S. C. 1001)—the only hearing officers specifically exempt by the Act from the operation of Section 5(c). If the Commissioner of Immigration presided at a deportation hearing, he alone would be exempt. (Senate Document 248, p. 262). The provisions of Section 7(a) were not designed to exempt hearing examiners from the requirement of Section 5(c) which contains its own exceptions. This is fortified by the legislative history of the Act.

In the Senate Committee Report of 1945, p. 21 (Senate Document 248, *supra*, p. 207) it is stated with reference to Section 7(a):

> "This subsection provides two mutually exclusive methods of hearing—by the agency itself (or one or more of its members) or by subordinate officials. *A third kind of hearing officer recognized in this subsection is one specially provided for or named in other statutes. Whoever presides is subject to the remaining provisions of the bill.*" (Italics supplied.)

And again in the House Committee Report of 1946 it is repeated with reference to all hearing officers recognized in Section 7(a) that:

> "Those who so preside are subject to the remaining provisions of the bill." *Senate Document 248, supra*, p. 268.

Significantly the Immigration Service considers exclusion proceedings within the exemption of Section 7(a) but

does not consider such exemption as removing it from Section 5. Exception from Section 5(c) is asserted in exclusion cases solely because of the exemption in Section 5(c) for initial licenses. Moreover, the Immigration Service concedes that it is an agency within the provisions of the Administrative Procedure Act and that it is subject to some of its provisions. (Monthly Review of the Immigration and Naturalization Service, February 1947, pp. 96,101). Nevertheless the opinion below would afford complete exemption to the Immigration Service. If it were intended to exempt the deportation process from all the provisions of the Administrative Procedure Act, the exemption would have been set forth in Section 2 (5 U. S. C. 1001) where general exemptions are provided. If it were intended to exempt statutory hearing officers from Section 5(c) it would have been set forth specifically in that section. We therefore submit that regardless of the application of 5 U. S. C. 1006(a) to the proceedings herein, 5 U. S. C. 1004(a) has been violated.

Point III

The Hearing Violated Section 11 of the Administrative Procedure Act and is Not Within the Exemption of Section 7(a).

The Immigration Service admittedly did not select the deportation hearing examiner herein in conformity with Section 11 of the Administrative Procedure Act (5 U. S. C. 1010). It can excuse this failure only upon the theory that the hearing was conducted pursuant to Section 7(a) (5 U. S. C. 1006a) by an officer specially provided for by or designated pursuant to statute.

> "In short unless the agency or its members or some specially qualified statutory officer hears the case, an examiner qualified under section 11 of this bill must do so." *Senate Document* 248, p. 364.

House Committee Report No. 1980, 79th Congress on the Administrative Procedure Act states:

> "The preservation of the 'conduct of specified classes of proceedings by or before boards or other officers specially provided by or designated pursuant to statute' is not a loophole for the avoidance of the examiner system; *it is intended to preserve only special types of statutory hearing officers who contribute some special qualifications,* as distinguished from examiners otherwise provided in the bill, and at the same time assure the parties fair and impartial procedure." *Senate Document 248,* p. 268 (Italics Supplied).

In his explanation of Section 7(a) Attorney General Clark stated on October 19, 1945:

> "The subsection is not intended to disturb presently existing statutory provisions which *explicitly* provide for certain types of hearing officers." *Senate Document 248,* supra, p. 227.

We submit that in the light of the foregoing, two requirements were contemplated to bring a case within the exemption of Section 7(a). First the hearing officer must be specifically designated pursuant to statute to conduct the proceeding, and secondly he must be a specially qualified officer.

(A) *Deportation Hearings are not Specially Provided Before Immigrant Inspectors.*

Immigrant inspectors are appointed pursuant to statute (8 U. S. C. 109) but deportation hearings are not a "specified class of proceedings before officers *specially* provided for or designated pursuant to statute," as the expression is employed in Section 7(a) of the Administrative Procedure Act.

The government has insistently contended in the instant case, in *Azzollini* v. *Watkins,* 172 F. (2d) 897, and in other

cases that deportation hearings are not *explicitly* required by statute but that "such hearings have evolved from well defined concepts of due process" (Brief, Court of Appeals, p. 17). In the *Azzollini* case it was asserted that: "The statute . . . nowhere even mentions a hearing. While a hearing is necessary in deportation cases, this requirement is one which has been evolved by judicial decisions based on concepts of due process rather than on statutory mandate." (Brief, Court of Appeals, p. 11). We agree with the government's contention that a deportation hearing is not in *haec verba* required by the statute. We believe however that it is required by the statute as a matter of judicial interpretation. Because the statute requires hearings as a matter of interpretation rather than explicitly, it cannot *specially* or *explicitly* provide for deportation hearing officers. The Attorney General and the House Committee were definite in their insistence that the Section 7(a) exemption of the Administrative Procedure Act applies only to "proceedings before officers *specially* provided" or to "statutory provisions which *explicitly* provide for certain types of hearing officers" *Senate Document 248, supra,* pp. 227, 268. Unlike Section 5, the Section 7(a) exemption by its very terms only applies where another statute *specially* provides for hearing officers.

Judge Holtzoff in the instant case (80 F. Supp. 235) and the Second Circuit in *Azzollini* v. *Watkins,* 172 F. (2d) 897, found that in a deportation hearing the immigrant inspector "is 'specially provided for or designated pursuant to statute', that is, by Sec. 16 of the Immigration Act of 1917, 39 Stat. 874, 885-886, 8 U. S. C. Sec. 152" and it was concluded that deportation proceedings were removed from the operation of Section 5(c) and 11 of the Administrative Procedure Act. Reference to the records and briefs in both cases will disclose that the deportation process and the Administrative Procedure Act was not

fully explained nor understood by those courts. Assuming the applicability herein of Section 7(a), we believe that Section 5(c) of the Administrative Procedure Act nevertheless applies. (Points I and II, *supra.*)

We submit that Section 16 of the Immigration Act of 1917 does not specially provide for deportation hearings nor for deportation hearing officers.

The initial step in a deportation case is the investigation of an alien by an immigrant inspector. This is followed by the issuance of a warrant of arrest and the formal deportation hearing.

8 C. F. R. 150.1, 150.3, 150.4a;
Steinberg, The Warrant Hearing in a Deportation Proceeding, Federal Bar Assn. Journal, July, 1945.

Detailed provisions for the conduct of a deportation hearing are contained in 8 C. F. R. 150.6.

Section 16 of the Immigration Act of 1917 (8 U. S. C. 152) does not provide for the *procedure* at the *formal deportation hearing.* Assuming that it applies to deportation at all, it merely grants authority to immigrant inspectors to *investigate* or *inspect.*

Section 16 of the Immigration Act of 1917 provides:

> "The inspection, other than the physical and mental examination, of aliens, including those *seeking* admission or readmission to or the privilege of passing through or residing in the United States, and the examination of aliens arrested within the United States *under this section,* shall be conducted by immigrant inspectors . . . . All aliens *arriving* at ports of the United States shall be examined by at least two immigrant inspectors . . . Immigrant inspectors are hereby authorized and empowered to board and search for aliens any vessel, railway car, or any other conveyance, or vehicle in which they believe aliens are being brought into the United States. *Said inspectors shall have*

the power to administer oaths and to take and consider evidence touching the right of any alien to enter, reenter, pass through, or reside in the United States, and, where such action may be necessary, to make a written record of such evidence; . . . All aliens *coming to* the United States shall be required to state under oath the purposes for which they come, the length of time they intend to remain in the United States, whether or not they intend to abide in the United States permanently and become citizens thereof, and such other items of information regarding themselves as will aid the immigration officials in determining whether they belong to any of the excluded classes . . . Every alien who may not appear to the examining immigrant inspector *at the port of arrival* to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry . . . The decision of an immigrant inspector, if favorable to the admission of any alien, shall be subject to challenge by any other immigrant inspector . . ." (Italics supplied).

It is doubtful that this section was intended to apply to any phase of the deportation process. *Contra, Graham* v. *U. S.*, 99 F. 2(d) 746. The section covers exclusion proceedings. The jurisdiction of immigrant inspectors and this section is defined in the first sentence to cover aliens seeking admission for temporary purposes or for residence.

Indeed, the section expressly provides that if the evidence thus developed does not establish beyond doubt the right of the alien to land, the alien shall be detained for examination before a Board of Special Inquiry. The conduct of the examination hearing before such Board is prescribed in detail in Section 17 of the Immigration Act of 1917. (8 U.S.C. 153.)

In any event, assuming that the section covers the deportation process, it relates solely to the authority of inspectors to investigate or to take a preliminary statement in the

initial informal state of the deportation process (8 C. F. R. 150.1 (a-c)).

In the *Report of the Secretary of Labor's Committee on Administrative Procedure* (The Immigration and Naturalization Service) by Marshall Dimock, Henry Hart and John McIntire (1940) at page 66 it is concluded:

> "*Basis of inquisitorial power*—Sweeping authority to question suspected aliens, *independently of any formal proceedings* against them, is conferred upon immigrant inspectors by Section 16 of the Act of 1917. . . In the unsatisfactory fashion characteristic of the immigration statutes, however, this authorization appears in the middle of a long paragraph dealing primarily with procedure at the border, and some doubt may exist as to whether it refers to *inquiries* concerning the rights of other than entering aliens. The Department, however, has taken the view that it does, and we are satisfied that such a view is correct." (Italics supplied.)

Section 16 of the Immigration Act of 1917 refers to the "inspection of aliens, the power of inspectors to administer oaths", "to take and consider evidence", "to make a written record of such evidence where necessary and to investigations . . . conducted by an immigrant inspector." Not a word is said about the conduct of deportation hearings as in the case of exclusion "hearings" before Boards of Special Inquiry (39 Stat. 887; 8 U.S.C. 153). The taking of evidence in the form of a preliminary statement from the alien (8 C. F. R. 150.1) is obviously not a provision for the conduct of a formal deportation hearing. (8 C. F. R. 150.6)

It seems clear that the Attorney General and the Immigration and Naturalization Service have never regarded this section as one relating to formal deportation proceedings. In promulgating regulations concerning the arrest, deportation and conduct of hearings thereon (Part

150, Title 8, Code of Federal Regulations), the Attorney General does not cite Section 16 of the Immigration Act of 1917 as forming the statutory basis or authority for the regulations (see Note following 8 C. F. R. 150.1(f)). On the other hand, regulations concerning the inspection and investigation of *arriving* aliens all refer to Sec. 16 of the Immigration Act of 1917 as statutory authority for their issuance. (See, e. g., 8 C. F. R. 110.7 to 110.11, 110.41, 110.46, 110.49, 110.50; 8 C. F. R. 12.2; 8 C. F. R. 118.6; 8 C. F. R. 120.22 to 120.24; 8 C. F. R. 130.4, 130.6, 130.8; 8 C. F. R. 140.1)

The conclusion of the Secretary of Labor's Committee that 8 U. S. C. 152 refers to the informal preliminary state of the deportation process is therefore well taken. It conforms to the government's insistent claim in the courts below that deportation hearings are not explicitly provided for by statute. This section thus cannot be made the basis for an exemption under 5 U. S. C. 1006. Section 16 (8 U. S. C. 152) does not provide for the conduct of a formal deportation hearing before an immigrant inspector and it has not heretofore been so interpreted by the Immigration Service.

(B) *Immigrant Inspectors are not Specially Qualified Statutory Officers.*

The exemption of Section 7 of the Administrative Procedure Act, 5 U. S. C. 1006 "does not mean that agencies are authorized—whether pursuant to the express authority of other statutes or not—to avoid the examiner system—set up in this bill . . . by assigning general employees or attorneys to hear cases individually or as boards. In short, unless the agency or its members or *some specially qualified statutory officer* hears the case, an examiner qualified under section 11 of this bill must do so. (Congressman Walter, Senate Document No. 248, 79th Congress, 2nd Session, p.

364. See also: Page 268 and Attorney General's Manual on the Administrative Procedure Act, pp. 71-72.)

56 Yale Law Journal 701 states:

> "'The committee reports' indicate that the exemption should be strictly construed, and in particular that statutory provisions authorizing the use of employees or attorneys generally should not be considered authorization for exemption. However, some statutory boards listed by the Attorney General in the Senate Report as examples of the exempted class seem to fall within the group which the reports indicate is not exempted. The apparent conflict can only be resolved on the grounds that the statutes setting up these boards did not authorize the use of employees generally but rather specified that their members should be selected from among eligible employees designated as such by the agency head."

The article concludes that the Immigration Service is required to comply with Section 11 (5 U. S. C. 1010) and appoint independent examiners in deportation cases.

The qualifications of immigrant inspectors are set forth in Announcement No. 4-71-1 (1949) of the Board of U. S. Civil Service Examiners. They are not required to be lawyers or to have any educational background but merely investigatory or interviewing experience. In this connection the provisions of 8 C. F. R. 60.27 should also be noted.

> "60.27. *Authority of patrol inspectors, special inspectors, naturalization examiners, and other officers to act as immigrant inspectors.* All persons serving under appointment heretofore or hereafter made as patrol inspectors, special inspectors, naturalization examiners, or other officers of the Immigration and Naturalization Service of a higher grade than patrol inspector, special inspector, or naturalization examiner are hereby designated immigrant inspectors without additional compensation. The work as immigrant inspectors shall be arranged by supervisory officers so as

not to interfere substantially with the performance of the duties of the other positions."

The duties of patrol inspectors are described in announcement No. 101 of the United States Civil Service Commission, issued June 1, 1948. This announcement describes their work as follows:

> "Patrol Inspectors will be members of the Immigration Border Patrol, a mobile uniformed enforcement organization; incumbents will be required to perform patrol duties on foot, by motor vehicle, by airplane, or on horseback. They will receive physical training equivalent to that given to commando units of the Armed Forces."

Although patrol inspectors are required to pass an aptitude test, there is no educational requirement for the position. It will therefore be observed that patrol inspectors, naturalization examiners and all employees other than clerks and stenographers may be utilized by the Immigration Service to conduct hearings.

The Attorney General's Manual on the Administrative Procedure Act (1947) at p. 72 acknowledges:

> "A statutory provision which merely provides for the conduct of hearings by any officers or employees the agency may designate, does not come within the exceptions so as to authorize the agency to dispense with hearing examiners appointed in accordance with section 11. H. R. Rep. p. 34 (Sen. Doc. p. 268)."

In testimony before the Senate Subcommittee on Immigration on S. 2755 (June 9, 1948), Ashley Sellers representing the American Bar Association pointed out that the exemption of Section 7 contemplated the appointment of a special type of responsible official rather than employees generally (pp. 93 *et seq*).

Under its regulations the Immigration Service may designate border patrol men as immigrant inspectors to conduct hearings. They may select officials outside the government to so act as they did in the *Bridges* case. Any person, in or out of the government, may be designated an immigrant inspector to sit on a Board of Special Inquiry. 8 C. F. R. 60.29(c). Immigrant inspectors need not be lawyers, need not be trained in the law or in immigration matters in order to be designated as a hearing officer. If hearings conducted by immigration inspectors fall within the exemption of 5 U. S. C. 1006, then a loophole has been provided for the examiner system.

It is therefore submitted that the exemption of Section 7(a) is inapplicable and that the respondents are required to appoint hearing examiners in conformity with Section 11 of the Administrative Procedure Act.

Conclusion

For approximately sixty years, the deportation process has been a blot upon our traditional concepts of Anglo-American jurisprudence. The Final Report of the Attorney General's Committee on Administrative Procedure in Government Agencies states that:

> "A man who has buried himself in one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions." (*Senate Document No. 8, 77th Congress, 1st Session*, p. 56).

The Secretary of Labor's Committee on Administrative Procedure (1940) urged that prosecuting and adjudicatory functions in deportation proceedings be separated. The commingling of these functions has been criticized and condemned by educators, immigration attorneys, government officials and by the judiciary.

Van Vleck, The Administrative Control of Aliens (1932), pp. 247, 46, 67;

The Secretary of Labor's Committee on Administrative Procedure, supra;

5 *National Commission on Law Observance and Enforcement* (1931);

Wasserman, The Challenge of our Immigration Laws, Journal of Legal and Political Sociology (Fall, 1944) p. 115.

Clark, Deportation of Aliens (1931);

Chaffee, Free Speech in the United States (1942) p. 198-201;

Bosny v. *Williams*, 185 Fed. 598.

Nevertheless, like a character transposed from Alice in Wonderland,* the immigration officer today plays the part of prosecutor-judge and jury.

If the most depraved criminal were convicted before an official who performed the functions of prosecutor and judge, his jail sentence would be set aside. Yet the most deserving alien is separated from his home, family and friends and is sentenced to banishment in distant lands by a prosecutor who sits as judge. Is it too much to expect that in such proceedings the quasi-judicial-hearing officer be independent and divorced from investigatory and prosecution functions?

We submit that the blot on our traditional concept of Anglo-American justice spilled by deportation procedures of former years has been removed by the Administrative Procedure Act.

The hearing herein was conducted by a disqualified official and was a nullity. Accordingly, petitioner is illegally

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* "I'll be judge. I'll be jury"
Said cunning old Fury;
"I'll try the whole cause,
And condemn you to death."

detained and the writ of habeas corpus should have been granted.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 154

WONG YANG SUNG,

Petitioner,

vs.

J. HOWARD McGRATH, ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, UNITED STATES COMMISSIONER OF IMMIGRATION AND NATURALIZATION,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

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REPLY BRIEF

POINT I

PETITIONER AND RESPONDENTS ARE IN AGREEMENT (1) THAT DEPORTATION STATUTE DOES NOT IN TERMS PROVIDE FOR A DEPORTATION HEARING. (2) THAT THE RATIONALE OF THE COURT BELOW IS ERRONEOUS

The respondents and petitioner are in agreement that the deportation statute does not *in terms* provide for a deportation hearing. The main contention of the government

(Point I) that a deportation hearing is not required by statute necessarily takes issue with the reasoning of the court below and that of *Azzollini* v. *Watkins*, 172 F. 2(d) 897. Petitioner likewise but for different reasons believes that the reasoning of these courts is erroneous.

The government correctly asserts in Point I of its brief (p. 17) that Section 7 of the Administrative Procedure Act and the exemption under Section 7(a) can be invoked only where an adjudication is required by statute after opportunity for a hearing. It was therefore a basis of the decision below herein and of the *Azzollini* case that the deportation statute required a hearing. The government attacks this conclusion in Point I of its brief but invokes it in Point II asserting that deportation hearings are not only statutory but that the statute specifically requires that hearings shall be conducted before immigrant inspectors.

Petitioner believes that deportation hearings are required as a matter of statutory construction and that the statute as interpreted by the Constitution requires a hearing. We feel that this is sufficient to bring the case within Section 5 of the Administrative Procedure Act. We agree with the government that the statute does not *in terms* prescribe that a deportation hearing shall be held. For this reason, the opinion below was erroneous. If the statute does not in terms require a hearing, it cannot require that such hearing shall be held before immigrant inspectors.

Point II

SECTION 16 OF THE IMMIGRATION ACT OF 1917 DOES NOT PROVIDE FOR DEPORTATION HEARINGS BEFORE IMMIGRANT INSPECTORS

The court below relied on Section 16 of the Immigration Act of 1917 (8 U.S.C. 152).

Section 16 provides that the "examination of aliens arrested in the United States under this section shall be con-

ducted by immigrant inspectors, except as hereinafter provided in regard to boards of special inquiry." This is a provision for the preliminary examination of aliens prior to hearings by boards of special inquiry. It is not a provision for any formal hearing. It obviously is not a provision for the conduct of deportation proceedings. If it were, it would be an explicit statutory direction to conduct hearings in deportation cases and to conduct them before immigrant inspectors. An *examination* is not a hearing. Moreover, deportation or exclusion hearings are not confined to the "examination of aliens" alone. Witnesses are usually presented by the opposing sides. The "examination of aliens" cannot therefore be stretched to include (1) a hearing, (2) a hearing of aliens and witnesses and (3) a deportation hearing. It should also be noted that arriving aliens can be—and usually are—arrested in the United States only at the border, at seaports, and on board their vessels. Immigrant inspectors have no extraterritorial powers of arrest. Therefore Section 16, in speaking of aliens arrested in the United States, does not as contended by the government plainly refer to aliens who may be deported rather than excluded.

Section 16 also grants authority to immigrant inspectors "to take and consider evidence touching the right of any alien to enter, reenter, pass through, or reside in the United States, and where such action may be necessary, to make a written record of such evidence." This provision can be understood only in the light of its statutory history.

Section 24 of the 1907 deportation statute (34 Stat. pt. 1, pp. 898, 906) provided in part:

> Immigrant officers shall have power to administer oaths and to take and consider evidence touching the right of any alien to enter the United States, and, where such action may be necessary, to make a written record of such evidence; and any person to whom such an

> oath has been administered under the provisions of this act who shall knowingly or wilfully give false evidence or swear to any false statement in any way affecting or in relation to the right of any alien to admission to the United States shall be deemed guilty of perjury and be punished as provided by section fifty-three hundred and ninety-two, United States Revised Statutes."

There can be no doubt that Section 24 of the 1907 statute related solely to arriving aliens. (See: *Bouvé*, The Exclusion and Expulsion of Aliens in the United States, 1912, at pp. 284-287.)

The committee reports which accompanied the Immigration Act of 1917 disclose that Section 16 was intended to apply only to arriving aliens.

Senate Report 355, 63rd Congress, 2nd Session, p. 10 states with reference to Section 16:

> "In this section are combined such provisions of Sections 17 and 24 of the act of 1907 as relate to the *examination of arriving aliens*. Various provisions have been added with a view to perfect the 'machinery' and to make the examination thorough and effective." (Italics supplied.)

Identical language will be found in Senate Report 352, 64th Congress, 1st Session, p. 12.

Several conclusions emerge from the foregoing. First, section 16 was not intended to cover the deportation process but only the *examination of arriving aliens*. It deals primarily and solely with arriving aliens. 8 U.S.C. 155 (Section 19) is the deportation section of the 1917 statute. Secondly, in granting immigrant inspectors power under the 1907 statute "to take and consider evidence" authority was not granted to conduct hearings. Section 24 of the 1907 statute distinctly referred to arriving aliens. Arriving aliens are first examined by immigrant inspectors but only granted hearings before boards of special inquiry.

(Section 25 of the 1907 statute; Section 17 of the 1917 statute, 8 U.S.C. 153). The use of the identical language in the 1917 statute granting immigrant inspectors authority "to take and consider evidence" should therefore not be construed as authority for the proposition that immigrant inspectors are empowered by this section of the statute to conduct hearings, even in exclusion proceedings, much less deportation proceedings.

Thirdly, assuming that the deportation process is encompassed in Section 16 as has been held by *Graham* v. *United States*, 99 F. (2d) 746 and *Loufakis* v. *United States*, 81 F. (2d) 966 without analysis or knowledge of its legislative history, no provision is made therein for deportation hearings before immigrant inspectors. Neither the *Graham* nor *Loufakis* cases indicate whether they were there concerned with preliminary examinations or investigations in deportation proceedings (8 C.F.R. 150.1) or the formal deportation hearing itself. (8 C.F.R. 150.6). Authority to conduct the informal preliminary inquiry does not cover authority to preside at the formal deportation hearing. See: *Report of Secretary of Labor's Committee on Administrative Procedure* (The Immigration & Naturalization Service), p. 66. The exemption of Section 7(a) of the Administrative Procedure Act is only applicable if Section 16 applies to the formal deportation hearing and it is submitted that it does not. That deportation hearings are not provided for by Section 16 is further supported by the government's contention with which we agree, that the requirement for deportation hearings is not in terms set forth in the statute.

It therefore follows that the holding below was erroneous because Section 16 does not provide that deportation cases shall be heard before immigrant inspectors and the exemption of Section 7(a) of the Administrative Procedure Act is inapplicable.

Point III

SECTION 5(c) OF THE ADMINISTRATIVE PROCEDURE ACT IS APPLICABLE

The government concedes that the exemption in Section 7(a) for certain statutory hearing officers "is not necessarily an exception from all of the provisions of Sections 5, 7 and 8." (Brief p. 45.) The Attorney General's Manual on the Administrative Procedure Act (p. 72) states that in cases where the exemption of 7(a) of the Administrative Procedure Act is invoked Section 5(c) is inapplicable only if inconsistent with the exemption. The government's brief herein states:

> "Also, the express exception of Section 7(a) for certain statutory hearing officers necessarily carries with it as much of an exception from the general separation of functions requirement of Section 5(c) as is necessary to give effect to the express exception." (Brief p. 44.)

The government correctly asserts that Congress did not desire to alter existing statutory proceedings. (Brief pp. 53, 54.) It provided in Section 7(a) that nothing in the act should supersede the *conduct* of specified classes of proceedings before officers specially designated by statute. The *conduct* of deportation hearings is not prescribed by Section 16 or any other section of the immigration statute and there is therefore nothing to be superseded. Moreover, there is nothing inconsistent with a requirement that deportation proceedings be conducted before immigrant inspectors and Section 5(c) of the Administrative Procedure Act prohibiting such inspectors from being subjected to the control or supervisions of investigatory officials. Indeed, the respondents' regulations requiring such hearing officers to refrain from engaging in the investigation of cases where they preside (8 C.F.R. 150.6-b) is not deemed inconsistent with the mandate of the deportation statute. Petitioner therefore

concludes that the Section 7(a) exemption does not except the deportation proceedings from the operation of Section 5(c) because it is not inconsistent therewith.

Point IV

OTHER CONTENTIONS OF RESPONDENTS NOT MATERIAL TO ISSUES HEREIN

Several miscellaneous assertions of the respondent will be given passing notice.

1. The record herein does not reveal and petitioner does not concede that he is "obviously deportable." He entered the United States legally. At the administrative hearing he testified that he was opposed to Communism. If deported, he would be returned to Shanghai, which fell to the Communists since his hearing. Petitioner is entitled to adjustment of his status to that of a permanent legal resident pursuant to Section 4 of Public Law 774, 80th Congress on the ground that he cannot return to China because of fear of persecution on account of his political opinions. Petitioner also believes that he is entitled to relief from deportation pursuant to 8 U.S.C. 155(c)(4).

2. Congress never acquiesced in respondents' interpretation of Section 5 of the Administrative Procedure Act. Congressional committees acted upon respondents' request for exemption but Congress itself never did. The House Judiciary Committee approved a blanket exemption from the operation of the Act with a dissent. The Senate Judiciary Committee refused to grant a blanket exemption but was willing to specifically provide that immigrant inspectors preside over deportation proceedings and thus give the Immigration Service an exemption under Section 7(a). The Senate and House Committees never came to an agreement on the type of exemption to be accorded the Immigration Service and it was never clear "that Congress was pre-

pared to confirm the administrative construction by clarifying legislation." (See Respondents' Brief p. 40.) On the contrary, it is equally logical to contend that the proposed legislation was corrective and necessary, rather than clarifying. And, assuming that Congress was *prepared* to enact "clarifying legislation" by what canon of statutory construction does that reinforce the government's interpretation of the statute?

3. The Respondents' interpretation of Section 5 of the Administrative Procedure Act is a strained one which does violence to the express language of the section and to the history of the Act. It was reached after divergent views had been expressed within the Department of Justice (Carusi, *Monthly Review*, Immigration and Naturalization Service, February, 1947 p. 99). Members of the Board of Immigration Appeals advised the Justice Department in 1946 that the deportation process was subject to the Administrative Procedure Act. Nevertheless, the respondents determined to follow its interpretation, criticized as it was from within the Department of Justice, and from without. 56 *Yale Law Journal* 683, 697, *Eisler* v. *Clark*, 77 F. Supp. 610. Despite this, respondents attempt to convey the impression that they acted with perfect assurance that their interpretation was correct.

4. Respondents assert that they will be subjected to inconvenience and expense if they are compelled to comply with the Administrative Procedure Act. At the same time, however, they say that they substantially comply with the provisions of that Act (Brief pp. 43, 56, note 27). See also: *Monthly Review*, Immigration and Naturalization Service, *supra*, p. 103). When the Attorney General recommended the enactment of the Administrative Procedure Act, he specifically recognized that in many agencies of the government the hearing examiner requirements would

result in increased expenses. Nevertheless, he stated that "this provision was one of the most important provisions in the Act." Senate Document 248, 79th Congress, p. 228. Major Schofield's testimony quoted at page 23 of our main brief contradicts respondents' assertions of inconvenience or alleged interference with the administration of the deportation laws. The interpretation of the law and the administration of justice does not hinge on allegations of inconvenience or expense to the government or to private parties.

Ten thousand cases already processed will not be affected by this decision. Deportation and the intervening oceans have washed away whatever errors were committed in most of those cases. Only those cases where the instant issue has been raised and those where the alien is still here will have to be reprocessed. The number of such cases is small. But, whether the number of cases or the expense be great or small, the issue herein is one of law and if the respondents have violated the Administrative Procedure Act, as we contend, judgment should be rendered in favor of petitioner.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 154

WONG YANG SUNG, PETITIONER

v.

TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, UNITED STATES COMMISSIONER OF IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT

On July 23, 1948, petitioner, a Chinese national, filed in the District Court for the District of Columbia a petition for a writ of habeas corpus (R. 2–4), alleging that he had resided in the United States since his arrival on April 21, 1946; that on or about October 14, 1947, he was taken into custody under a warrant of arrest issued by the Attorney General on the preceding day; and that on December 11, 1947, he had been accorded a hearing before a presiding inspector of the Immigration and Naturalization

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Service under the arrest warrant, following which he was ordered deported. The petition challenged the validity of the deportation order (R. 3) on the ground that the hearing accorded him had not been conducted in accordance with the provisions of the Administrative Procedure Act of June 11, 1946, 60 Stat. 237, *et seq.* In particular, it was alleged that the presiding inspector was not a qualified hearing examiner appointed pursuant to Section 11 of the Act and "was responsible to and subject to the supervision and direction of" officers and agents of the Immigration and Naturalization Service "engaged in the performance of investigation and prosecuting function[s]," in violation of the separation of functions provisions of Section 5 (c).

The writ issued (R. 4–5) and a return was filed (R. 6). Following a hearing, the District Court (Holtzoff, D. J.) entered an order (R. 7) and opinion (80 F. Supp. 235) discharging the writ and remanding petitioner to custody, on the ground that the deportation hearing "was in accord with the provisions of law that govern same" and that the Administrative Procedure Act has no application to such hearings, by virtue of Section 7 (a) thereof, which provides that "nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute" (R. 6–7; 80 F. Supp. 235–

236). The "statute" which, in the opinion of the District Court, "specially provide[s] for" the conduct of deportation hearings is Section 16 of the Immigration Act of 1917 (80 F. Supp. at 236).

On appeal by petitioner to the Court of Appeals for the District of Columbia Circuit, the judgment of the District Court was affirmed (R. 9). The *per curiam* opinion of the Court of Appeals states simply that:

> The judgment of the District Court is affirmed on the opinion of Judge Holtzoff. *Wong Yang Sung* v. *Clark*, 80 F. Supp. 235. It is immaterial that appellant entered the United States legally. *Azzollini* v. *Watkins*, (C. A. 2d) decided March 10, 1949 [172 F. 2d 897].

The decision of the court below, as indicated in the opinion, is in accord with that of the Court of Appeals for the Second Circuit in *Azzollini* v. *Watkins*, 172 F. 2d 897. There are no contrary decisions,[1] and, the Government is of the view that the issues here mooted have been correctly decided below.

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[1] *Eisler* v. *Clark*, 77 F. Supp. 610 (D. C.) held that deportation proceedings are subject to the requirements of the Administrative Procedure Act. But in that case the court evidently overlooked the excepting clause in Section 7 (a) of the Act and the effect of that clause, in view of Section 16 of the Immigration Act of 1917, as exempting deportation proceedings from the provisions of the Administrative Procedure Act. At least, Section 7 (a) is not mentioned in the opinion. In any event, even if the *Eisler* case could be con-

Nevertheless, the questions raised are of obvious importance in the administration of the immigration laws and an early authoritative decision seems desirable from every point of view.

Consequently, the Government does not oppose the issuance of a writ of certiorari in this case.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

AUGUST 1949.

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sidered a contrary decision in respect of the point now under discussion, it must be taken to have been overruled by the decision of the Court of Appeals in the present case.

Diametrically opposed to the *Eisler* case is *Fajardo* v. *United States* (S. D. N. Y., Civil 46–214, not reported). See Ginnane, "*Rule Making*," "*Adjudication*" *and Exemptions under the Administrative Procedure Act*, 95 U. of Pa. L. Rev. 621, 635. See also the statement of Mr. Ashley Sellers, Chairman, National Committee, Section on Administrative Law, American Bar Association, that in his opinion the *Eisler* case was erroneously decided (Hearings before Senate Judiciary Subcommittee on Immigration and Naturalization on S. 2755, 80th Cong., 2d sess, p. 102).

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 154

WONG YANG SUNG, PETITIONER

v.

J. HOWARD MCGRATH, ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, UNITED STATES COMMISSIONER OF IMMIGRATION AND NATURALIZATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the Court of Appeals (R. 8) is reported at 174 F. 2d 158. The opinion of the District Court is reported at 80 F. Supp. 235.

JURISDICTION

The judgment of the Court of Appeals was entered April 4, 1949 (R. 9). The petition for a writ of certiorari was filed July 1, 1949 and was

granted October 10, 1949. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether administrative hearings in deportation cases must be conducted in accordance with Sections 5 (c), 7 (a) and 11 of the Administrative Procedure Act.

STATUTES INVOLVED

The authority of immigrant inspectors is defined in Sec. 16 of the Immigration Act of February 5, 1917, 39 Stat. 874, 885, as amended, 8 U. S. C. 152, which provides, in part, that:

> * * * The inspection * * * of aliens, including those seeking admission or readmission to or the privilege of passing through or residing in the United States, and the examination of aliens arrested within the United States under this Act.[1] shall be conducted by immigrant inspectors, except as hereinafter provided in regard to boards of special inquiry. * * * Said inspectors shall have the power to administer oaths and to take and consider evidence touching the right of any alien to enter, reenter, pass through, or reside in the United States, and, where such action may be necessary, to make a written record of such evidence; * * *.

[1] The original act, 39 Stat. 886, reads "under this Act", although in the codification, 8 U. S. C. 152, it reads "under this section." The former is controlling. 1 U. S. Code 112, 204 (a).

Authority for the deportation of aliens unlawfully in the United States is granted by Sec. 19 (a) of the Immigration Act of February 5, 1917, as amended, 8 U. S. C. 155 (a), which provides, in part, that:

> * * * any alien who shall have entered or who shall be found in the United States in violation of this Act, or in violation of any other law of the United States * * * shall, upon the warrant of the Attorney General, be taken into custody and deported. * * * In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Attorney General shall be final.

Sec. 5 of the Administrative Procedure Act of June 11, 1946, 60 Stat 237, 239, 5 U. S. C. 1004, establishes a number of formal requirements to be applicable "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." Petitioner invokes that portion of Sec. 5 (c) which declares that the administrative officer who presides at the reception of evidence shall not "be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency."

Sec. 7 (a) of the Administrative Procedure Act, 5 U. S. C. 1006, provides in part:

> In hearings which section 4 or 5 requires to be conducted pursuant to this section—
>
> (a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. * * *

Sec. 11 of the Administrative Procedure Act, 5 U. S. C. 1010, provides in part:

> Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners

shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, and the provisions of section 9 of said Act, as amended, shall not be applicable. * * *

STATEMENT

Petitioner is a native and citizen of China. He arrived at the port of New York, N. Y. on April 21, 1946 as a member of the crew of the SS Silver Walnut. Upon arrival he was granted shore leave for a period not exceeding 29 days, in conformity with law.[2] However, he did not return to his ship, overstayed his allotted period of shore leave, and continued to remain unlawfully in the United States.

Petitioner was taken into custody by the Immigration and Naturalization Service on or about October 14, 1947, under a warrant of arrest issued October 13, 1947, and thereafter was released on bail pending disposition of his case. He was granted hearings before an immigrant inspector on December 11, 1947, and January 29, 1948. At those hearings he was represented by counsel. At the conclusion of the hearings, the immigrant inspector recommended that he be deported.

[2] Sections 3 (5) and 19, Immigration Act of 1924, 8 U. S. C. 203 (5) and 166; 8 CFR 120.21.

Upon considering the evidence in the record of hearing, the Acting Commissioner of Immigration and Naturalization, on March 22, 1948, concluded that petitioner was subject to deportation under Section 14 of the Immigration Act of 1924, 8 U. S. C. 214, on the ground that he had remained in the United States for a longer time than permitted by the terms of his admission.[3]

Petitioner then appealed to the Board of Immigration Appeals and, on May 24, 1948, his counsel was allowed to offer oral argument before that Board. On June 4, 1948, the Board of Immigration Appeals dismissed petitioner's appeal and affirmed the order of the Acting Commissioner directing that he be deported to China.[4]

Petitioner was thereupon taken into custody under the order and warrant of deportation. He then brought habeas corpus proceedings in the United States District Court for the District of Columbia challenging the deportation process on the ground that it had not been conducted in conformity with Secs. 5 and 11 of the Administrative Procedure Act (R. 2–4). A writ of habeas corpus was issued (R. 4–5) and a return was filed (R. 7). Following a hearing, Judge Holtzoff on July 29, 1948, discharged the writ and remanded petitioner

[3] See also 8 CFR 120.37.

[4] This recital of the factual background is based on the original records of the Immigration and Naturalization Service.

to custody on the ground that Sec. 7 (a) of the Administrative Procedure Act, viewed in conjunction with Sec. 16 of the Immigration Act of 1917, exempted deportation hearings from the general requirement that hearings be conducted by hearing examiners appointed in accordance with Section 11 of the Administrative Procedure Act (80 F. Supp. 235; R. 6, 7).

Petitioner appealed to the Court of Appeals for the District of Columbia Circuit which in a *per curiam* opinion, affirmed on the opinion of Judge Holtzoff (R. 8, 9). The Government did not oppose the issuance of a writ of certiorari in this case, since the questions raised in the petition are of obvious importance in the administration of immigration laws, and an authoritative decision by this Court was deemed desirable.

SUMMARY OF ARGUMENT

This case involves only the naked issue of whether hearings in deportation proceedings are required to be conducted in accordance with Sections 5 (c), 7 and 11 of the Administrative Procedure Act. In terms of administration, the question is whether such hearings must be conducted by hearing examiners appointed in accordance with Section 11, or whether immigrant inspectors may continue to conduct them. The facts requiring petitioner's deportation are undisputed, and he does not assert any denial of

procedural due process under the Fifth Amendment in the proceedings leading to the order for his deportation.

I

Deportation proceedings are "adjudication" for the purposes of the Administrative Procedure Act. The hearing examiner requirements of Section 11 and the separation of functions requirements of Section 5 (c) invoked by petitioner are expressly made applicable only to cases of adjudication "required by statute to be determined on the record after opportunity for an agency hearing." The legislative history of the Act compels a strict interpretation of these words so as to make Sections 5, 7, 8 and 11 applicable only to cases as to which Congress by some other statute has specifically required an opportunity for an administrative hearing. It is only by such a construction that the Congressional purpose of making the application of the Act clear and predictable can be effectuated.

Congress, in the Immigration Acts, has never specifically required opportunity for hearing in deportation proceedings, although opportunity for hearing is required by the due process clause of the Fifth Amendment. The legislative history of the Administrative Procedure Act reveals that Congress was fully informed of the practical difficulties which would result from application of that Act to immigration procedures, and

strongly suggests that the precisely drawn coverage provisions were intended to exclude such procedures. In any event, Congress is fully aware of the administrative construction of the Act as not applying to deportation proceedings, and has at least acquiesced in that interpretation.

II

As a separate basis of decision, the Government contends that deportation proceedings are excepted from the provisions of the Administrative Procedure Act invoked by petitioner by Section 7 (a) of that Act. Section 7 (a) provides that nothing in the Act shall supersede the conduct of administrative proceedings by "officers specially provided for by or designated pursuant to statute" for that purpose. Since Section 16 of the Immigration Act of 1917 specifically authorizes, if, indeed, it does not require, the conduct of deportation proceedings by immigrant inspectors, it follows that such proceedings are not required to be conducted by examiners appointed in accordance with Section 11 of the Administrative Procedure Act.

Immigrant inspectors who, under Section 7 (a) may conduct deportation proceedings because they are "officers specially provided for" by the Immigration Act, are likewise excepted from the provision of Section 5 (c) that hearing officers shall not be "responsible to or subject to the

supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency." This follows from the fact that Section 7 (a) does not merely authorize officers "specially provided for" by statute to continue to act as hearing officers, but provides expressly that "nothing in this Act shall supersede the conduct" of proceedings by such officers. Clearly, immigrant inspectors who have been expressly authorized by Congress to conduct deportation proceedings are not to be precluded from doing so because of their status in the Immigration and Naturalization Service as immigrant inspectors.

ARGUMENT

INTRODUCTION

The sole issue in this case is whether the administrative hearing which resulted in an order for petitioner's deportation should have been conducted before a hearing examiner appointed in accordance with Section 11 of the Administrative Procedure Act and functioning in accordance with Section 5 (c) of that Act. Petitioner was given a full hearing before an immigrant inspector, and there is no claim that this hearing was unfair in any respect or that petitioner was deprived of any right which the courts have held to be embodied in due process of law as applied to the deportation of aliens. The facts

are undisputed, and the petitioner is obviously deportable.

The order for petitioner's deportation was the result of a proceeding conducted as follows: Whenever a preliminary investigation indicates prima facie that an alien may be subject to deportation, 8 CFR 150.1, application is made for the issuance of a warrant of arrest. 8 CFR 150.2. Such a warrant may issue only if it is determined that probable cause exists, and its issuance must be authorized by a designated official of the Central Office of the Immigration and Naturalization Service, or, in certain instances, by an officer in charge of a field district. 8 CFR 150.3. When the alien is arrested, he is furnished with a copy of the warrant and notified of his right to counsel and release under bond. 8 CFR 150.4. After a reasonable time to enable the alien to prepare his defense and obtain counsel, he is granted a hearing to determine whether he is subject to deportation. 8 CFR 150.6 (a). The immigrant inspector assigned to conduct the hearing, known as the presiding inspector, cannot be the same officer who conducted the investigation unless the alien consents. 8 CFR 150.6 (b). The officer in charge of the district may assign a second immigrant inspector, known as the "examining inspector", to present the evidence on behalf of the Government. 8 CFR 150.6 (n). However, in the ordinary case the presiding in-

spector conducts the hearing alone, incorporates all available evidence in the record, and interrogates all witnesses. 8 CFR 150.6 (b). The alien and his counsel may participate fully in the hearing, offer evidence, make appropriate objections and exceptions, and examine and cross examine witnesses. 8 CFR 150.6 (d) and (e).

After the hearing is concluded, the presiding inspector prepares proposed findings of fact and conclusions of law and a proposed order on the basis of the evidence adduced at the hearing. 8 CFR 150.7 (a) and (c). A copy of the proposed findings, conclusions, and order is served on the alien or his counsel, who are allowed a reasonable time to file exceptions. 8 CFR 150.7 (d) and (e). The record is then forwarded to the Central Office for a decision by the Commissioner or an officer designated by him. 8 CFR 150.9. The alien may appeal to the Board of Immigration Appeals from an adverse order of the Commissioner. 8 CFR 90.3. If the alien's deportation eventually is ordered, he is taken into custody under a warrant of deportation, if not already in custody, and deported. 8 CFR 150.12.

The above procedure governs the conduct of almost 2,000 deportation hearings per month. The Government admits that the administrative hearing in the instant case, like the hearing in other deportations cases, was not conducted by a hearing examiner appointed in ac-

cordance with Section 11 of the Administrative Procedure Act, and that there was not full compliance with the separation of functions requirements of Section 5 (c). It is the Government's position, first, that the hearing in deportation proceedings is not required by the Immigration Act (although required by due process of law) and therefore is not a hearing "required by statute" within the meaning of the introductory clause of Section 5 of the Administrative Procedure Act; if that contention is correct, it follows that deportation proceedings are not subject to any of the provisions of Sections 5, 7, 8 and 11 of the Administrative Procedure Act. The Government also contends that even if the hearing in deportation proceedings is held to be a hearing "required by statute" within the meaning of Section 5, nevertheless the requirement of Section 7 (a) that hearings be conducted by examiners appointed in accordance with Section 11 is inapplicable, since Congress has directed, in Section 16 of the Immigration Act of 1917, that deportation proceedings be conducted by immigrant inspectors, who are therefore within the express exception of Section 7 (a) for "officers specially provided for by or designated pursuant to statute". We further contend that this exception under Section 7 (a) for special statutory hearing officers carries with it as much of an exception from the separation of functions requirements

of Section 5 (c) as is necessary to give effect to the express exception of Section 7 (a). Upon either basis, the hearing leading to the order for petitioner's deportation was not required to be conducted by a hearing examiner appointed in accordance with Section 11 of the Administrative Procedure Act and functioning in accordance with the separation of functions requirements of Section 5 (c).

The Administrative Procedure Act is the result of long study of the administrative procedures of Federal administrative agencies. Its roots are in the Report of the Attorney General's Committee on Administrative Procedure and in the extensive hearings conducted in 1941 by a subcommittee of the Senate Committee on the Judiciary on S. 674 and other bills. Leaving aside the portions of the Act dealing with public information, licensing and judicial review, the Act establishes minimum procedural requirements for "rule making" and "adjudication". A proceeding conducted by the Immigration and Naturalization Service to determine whether a particular alien should be deported, is clearly "adjudication" within the definition of Section 2 (d) of the Act.

Section 5 of the Administrative Procedure Act defines the cases of adjudication which must be conducted in accordance with the provisions of Sections 5, 7 and 8; those provisions are made

applicable to "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," with some exceptions not relevant here. In such cases, the notice of hearing must comply with Section 5 (a) and procedures for informal settlement must be afforded in accordance with Section 5 (b). Section 7 (a) requires that in cases subject to Section 5 the hearing must be conducted by the head of the agency involved or one of the members of a multi-headed agency, e. g., a commission, or by an examiner appointed in accordance with Section 11. For example, a hearing under Section 8 of the Securities Act (15 U. S. C. 77h) may be conducted by the Securities and Exchange Commission itself, by one or more members of the Commission, or by an examiner appointed in accordance with Section 11 of the Administrative Procedure Act. A hearing examiner appointed in accordance with Section 11 is given a status independent of the agency which he serves, in that his compensation, promotion and removal are placed in the control of the Civil Service Commission. Section 11 also provides that such examiners "shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners." However, Section 7 (a) also provides that "nothing in this Act shall be deemed to supersede the conduct of specified classes of

proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute."

Section 7 (b) specifies the powers which are to be exercised by officers presiding at hearings with respect to such matters as subpenas. Section 5 (c) provides that the officer presiding at a hearing shall not "be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency." The latter persons are also prohibited from participating, except as witnesses or counsel in public proceedings, in the hearing officer's initial or recommended decision or in the agency's final decision. These are the "separation of functions" requirements of the Administrative Procedure Act.

Under Section 8, which by its terms applies only to cases governed by Section 7, there must be made, and submitted to the parties with an opportunity to file exceptions, an intermediate decision which may be either a tentative or proposed decision by the agency itself, or a decision by the hearing officer which in turn may be either a recommended decision or an "initial" decision which will become final in the absence of appeal to or review by the agency.

I

SINCE HEARINGS IN DEPORTATION PROCEEDINGS ARE NOT REQUIRED BY ANY STATUTE, BUT ARE ACCORDED AS A MATTER OF DUE PROCESS OF LAW, SUCH HEARINGS ARE NOT SUBJECT TO SECTIONS 5, 7, 8 AND 11 OF THE ADMINISTRATIVE PROCEDURE ACT.

The hearing examiner requirements embodied in Sections 7 (a) and 11 of the Administrative Procedure Act and the separation of functions requirements of Section 5 (c) are applicable only to cases of adjudication in which a hearing is "required by statute," i. e., by some statute other than the Administrative Procedure Act. This follows from the fact that Section 5 by its introductory clause is applicable only to such cases, Sections 7 and 8 by their express terms are applicable only to hearings which are required to be conducted in accordance with Section 5, and Section 11 applies only to appointment of such "examiners as may be necessary for proceedings pursuant to sections 7 and 8." Thus, none of these sections are applicable to deportation proceedings unless the hearings in deportation proceedings are hearings "required by statute", i. e., by the Immigration Act of 1917. We will show that Section 5 (and, therefore, Sections 7, 8 and 11) of the Administrative Procedure Act are applicable only to cases as to which the Con-

gress has expressly required an opportunity for hearing, and that the Congress has never specifically required hearings in deportation proceedings although such hearings are required by due process of law. It will also be shown that the Congress is fully aware that the Immigration and Naturalization Service has at all times construed Sections 5, 7, 8 and 11 of the Act as not applying to deportation proceedings and, that with such knowledge the Congress has at least acquiesced in this interpretation.

A. SECTIONS 5, 7, 8 AND 11 OF THE ADMINISTRATIVE PROCEDURE ACT ARE APPLICABLE ONLY TO CASES IN WHICH THE CONGRESS HAS EXPRESSLY REQUIRED AN OPPORTUNITY FOR AN ADMINISTRATIVE HEARING.

A most important problem in the drafting of the Administrative Procedure Act was to determine to what administrative actions it should apply. This was met by providing that Articles 5, 7, 8 and 11 should apply only to cases of adjudication "required by statute to be determined on the record after opportunity for an agency hearing." By this provision, Congress sought to enable private persons and administrators to determine readily the proceedings to which these sections are applicable.

The legislative history of the Administrative Procedure Act.—The failure to resolve that problem in the Walter-Logan bill (H. R. 6324, 76th Cong., 3d Sess.) was one of the reasons

which led President Roosevelt to veto that bill. As Attorney General Jackson advised the President: "This bill, however, lays down a series of blanket requirements for the promulgation of rules and the conduct of hearings by administrative agencies and for judicial review of their action. In doing so it amends literally hundreds of statutes. Just what statutes are amended or repealed is not stated, but left to the always debatable implication." House Document No. 986, 76th Cong., 3d Sess. (1940) p. 8.

In 1941, the Attorney General's Committee on Administrative Procedure issued its Final Report. This report contained drafts of two proposed bills—embodying the so-called majority and minority recommendations. Under both proposals, the provisions relating to formal adjudication were applicable only to proceedings in which a hearing was "required by law."[5]

[5] Section 301 of the majority draft provided that "The provisions of sections 302 to 309, inclusive, of this title shall be applicable only to proceedings wherein rights, duties, or other legal relations are required by law to be determined after opportunity for hearing, and, if a hearing be held, only upon the basis of a record made in the course of such hearing." Final Report, p. 195. Section 301 of the minority draft contains a similar provision. Final Report, pp. 232–233.

There was no exemption of deportation hearings, as such. Indeed, the Committee apparently contemplated that its recommendations regarding independent hearing commissioners would include the Immigration and Naturalization Service. Final Report, p. 46, n. 4.

Various bills to effectuate the majority and minority recommendations of the Attorney General's Committee were introduced in 1941. The Senate Judiciary Committee conducted extended hearings on these bills.[6] Major Schofield, then the active head of the Immigration and Naturalization Service, testified at some length concerning the impact of the projected legislation. *Senate Hearings* (1941), p. 556 *et seq.* He stated, in the testimony quoted at p. 8 of the petition herein, that the legislation then under consideration[7] apparently would embrace deportation procedures. However, his testimony included many other highly significant facets. For example, he called attention to the ambiguity of the phrase "required by law," and suggested that there should be some clarification of this language (Id., p. 577):

> We think that that ought to be made more specific and that it ought to read something like this: That they shall apply "only to proceedings wherein rights, duties or other legal relations are *required by the constitution or statutes* to be determined after opportunity for formal hearing, and if such a hearing be held, only upon the basis of a record made in the course of such hearing.

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[6] Printed as *Hearings before a Subcommittee of the Committee on the Judiciary*, United States Senate, 77th Cong., 1st Sess., on S. 674, S. 675, and S. 918 (1941), and herein referred to as *Senate Hearings* (1941).

[7] Which provided for hearings "required by law."

> In other words, so that it would be clear that this statute would apply only to those matters of administrative function in our service, which are disposed of by formal hearing. This would mean exclusion cases and deportation cases. [Emphasis supplied.]

Acting Attorney General Biddle likewise suggested that "statute or constitution" be substituted for "law", in order to clarify the statute's scope. *Id.*, p. 1456. A similar suggestion was made by Interstate Commerce Commissioner Aitchison, who declared (*id.*, p. 453–4):

> Further, the bill speaks of a hearing "required by law". Does this, in a case where the statute is silent, require the agency to determine whether the Constitution implies a right to be heard.

Moreover, at another point in his testimony, Major Schofield emphasized the practical difficulties and expenses that would be incurred by the Immigration and Naturalization Service. His statements illuminate the subsequent course of legislative action (*id.*, p. 573–574):

> Major SCHOFIELD. The committee must realize that an immigrant inspector performs many other duties in addition to conducting hearings, and his services would still be required to perform those other duties. Ships must be boarded, seamen must be examined and fingerprinted, papers must be lifted, trains must be boarded, air-

planes must be met and the passengers examined, and so on.

Last year, the fiscal year ending June 1940, we made at seaports alone 1,600,890 examinations of one kind or another. People seeking to come in—that includes everybody; sailors, passengers, citizens, non-citizens, every kind.

At the land-border ports there were arrivals to the number of 50,102,398.

Senator DANAHER. That includes border crossings, doesn't it?

Major SCHOFIELD. Everything. Repeated crossings. Commuters and everybody, but they all must be examined. It includes aliens and citizens, too, but there were that many examinations which had to be made by our Service. So that the total for the fiscal year ending 1940 was 51,703,288. Now that means that we must have an adequate staff and force of immigrant inspectors, and so if we are by statute now to provide for hearing commissioners in the main, not entirely, but in the main they will have to be appointed new. Additional personnel in our Service.

Now when it is remembered that we have 22 districts throughout the United States and its insular possessions, 226 ports of entry, and an additional 153 interior offices like Pittsburgh, Cincinnati, Kansas City, Salt Lake City, Denver, and St. Louis, where deportation hearings must take place, and when it must be remembered that—

and when it must be recalled that we must have boards of special inquiry, or under the new statute, hearing commissioners, to do the work that our boards of special inquiry now perform, namely, to sit on the right of aliens to enter, and determine whether they should be excluded; and they must be available when boats arrive at ports of entry or when trains arrive at land ports and airplanes arrive, and taking into consideration also that there could be some moving about, shifting of hearing commissioners from one point to another, bearing in mind also, however, the vast distances in some of our districts, especially out in the West, we have estimated that it would require 225 hearing commissioners over and above our present personnel at an average salary of $5,000 per annum, or $1,150,000. *It isn't worth it. There is no purpose that can be served by the expenditure of that money.* Because I take it that these hearing commissioners would be confined in their duties to the duties prescribed in the statute, and they would be hearing commissioners, and that will, and that would also involve another economic waste because while they are waiting for a hearing I don't know what they would be compelled to do. Many of these hearings take less than an hour and require no witnesses and no great ability to conduct or decide.

Many of them are extraordinarily simple and relate to illegal entry, for instance, and

> the like, where no real complicated issue is involved either of law or fact. [Emphasis supplied.]

At the conclusion of the Senate Committee's hearings, the minority group of the Attorney General's Committee made a supplemental statement taking cognizance of criticisms and suggesting appropriate amendments. Mr. Carl McFarland acted as principal spokesman for this group, and his testimony included the following statement (*id.*, p. 1349):

> The Immigration Service (pp. 564–576) objects to the application of the title to some of its functions; the objection is well taken and section 301 should be amended by adding a further subdivision to exempt: "(i) the admission or control of aliens."

An observation and recommendation in identical language appears in the written statement and proposed revision of S. 674 submitted by this group. *Id.*, pp. 1390, 1411.

Thus, during the 1941 Senate hearings, the question was squarely raised as to what administrative proceedings should be subject to the proposed legislation. Also, a group of proponents of the legislation indicated their belief that there should be excepted from the formal adjudicatory requirements proceedings relating to "the admission or control of aliens"—an exception which would clearly cover deportation proceedings.

With the outbreak of the war, the subject of administrative procedure was left in abeyance until June 1944, when the Chairmen of the Senate and House Judiciary Committees introduced identical bills,[8] the procedural provisions of which were to be applicable "In every administrative adjudication in which the rights, duties, obligations, privileges, benefits, or other legal relations of any person are required by statute to be determined only after opportunity for an administrative hearing". These bills contained no reference of any kind to immigration proceedings. It should be noted that these bills were the first to limit their application to cases in which hearings were required by statute. And the only introduced bill which ever provided an express exception for proceedings relating to "the admission or control of aliens", significantly, was one[9] which still referred to hearings "required by law".

In 1945, revised bills were introduced by the Chairmen of the Senate and House Judiciary Committees as S. 7 and H. R. 1203. These bills, after extensive revision, resulted in the Administrative Procedure Act. The history of these bills is replete with evidence that what are now Sections 5, 7, 8 and 11 of the Administrative Procedure Act were intended to apply only to cases of adjudication in which Congress, by some other

[8] S. 2030 and H. R. 5081, 78th Cong., 2d Sess.

[9] H. R. 1206, 79th Cong., 1st Sess. (1945), Section 301.

statute, had specifically required opportunity for an administrative hearing. Thus the Senate Judiciary Committee's Comparative Print of 1945, Sen. Doc. 248,[10] p. 21, contains the following statement:

> The introductory clause removes from the operation of sections 5, 7, and 8 all administrative procedures in which *Congress has not required* orders to be made upon a hearing, and the first of the further exceptions eliminates matters subject to a subsequent trial of the law and the facts de novo in any court. Limiting application of the sections to those cases in which statutes require a hearing is particularly significant, because thereby are excluded the great mass of administrative routine as well as pensions, claims, and a variety of similar matters in which Congress has usually *intentionally or traditionally* refrained from requiring an administrative hearing. [Emphasis supplied.]

The same report, in discussing Section 7, specifies that "the provisions of Section 7 respecting hearings are not designed to require hearings where Congress has not already done so by statute." *Id.*, p. 28.

[10] Senate Document No. 248, 79th Cong., 2d Sess., is a compilation of the legislative history of the Administrative Procedure Act. It includes the committee reports, debates and the 1945 hearings before the House Committee on the Judiciary.

Similarly, Mr. Carl McFarland again testified concerning the revised legislation before the House Judiciary Committee on June 21, 1945, in his capacity as Chairman of the American Bar Association's Committee on Administrative Law and stated, Sen. Doc. 248, p. 79:

> But none of the measures, I think, with one exception, provides that the procedure in respect to adjudication shall apply to any case *unless Congress has specifically, by some other statute, required an administrative hearing.* [Emphasis supplied.]

The Senate Committee report recommending favorable action on this legislation, Sen. Rep. 752, 79th Cong., 1st Sess., included an analysis of the bill made at the request of the Committee Chairman by the Attorney General, who stated without contradiction that the reference to hearings "required by statute" results in limiting Section 5 (and, therefore, Sections 7, 8 and 11) to *"cases in which the Congress has specifically required* a certain type of hearing."[11] [Emphasis supplied.] Sen. Doc. 248, p. 226. Moreover, the report itself stipulated that this language limited the operation of the pertinent statutes of the sec-

[11] The Attorney General's interpretation under these circumstances is "an indication of the Committee's opinion on the intended effect of the Act." *American Stevedores* v. *Porello*, 330 U. S. 446, 452 (1947). Moreover, representatives of the Department of Justice had worked closely with the Judiciary Committees on this legislation. Sen. Doc. 248, pp. 191, 248.

tion "to cases in which other statutes require the agency to act upon or after a hearing." *Id.*, p. 202. Identical language is found in the report of the House Judiciary Committee, Sen. Doc. 248, p. 260, and in the remarks of Representative Walter, sponsoring the bill on the floor of the House of Representatives, Sen. Doc. 248, p. 359. The report of the House Committee, House Rep. 1980, 79th Cong., 2d Sess., after referring to the 1941 testimony by various agencies, specifically including the Immigration and Naturalization Service, also made the following significant observations, Sen. Doc. 248, p. 247:

> It can be said fairly that no point raised by any agency in those very lengthy and detailed hearings has not been given full consideration in the drafting of the present bill, and indeed in almost every instance the present bill avoids the difficulties which Government agencies then feared * * *. Some agencies did not want hearings provided (pp. 1389–1398, 1394), and the present bill provides the details for hearings only *where other statutes require a hearing.* (See sec. 4 (b) and the introductory clause to sec. 5.) [Emphasis supplied.]

It should be observed that the page references in this quotation include page 1390 of Senate Hearings (1941) and it was on this page that the minority group in the Attorney General's

Committee on Administrative Procedure agreed with the objections of the Immigration Service and recommended the exemption of immigration functions.

To summarize the legislative history on this point: when, commencing in 1941, Congress sought to define precisely the cases of adjudication to which administrative procedure legislation would apply, it was because there was agreement that such legislation could not be applied to all actions of all administrative agencies. Also, it was not practical to list or enumerate the particular administrative proceedings to be covered. Therefore, it was proposed to apply the formal procedural requirements to cases in which a hearing was otherwise "required by law". Then the question was raised as to whether this phrase referred to hearings required by the statute or by the Constitution. Specifically, it was asked, "Does this, in a case where the statute is silent, require the agency to determine whether the Constitution implies a right to be heard?" (*supra,* p. 21). Apparently these questions, raised during the 1941 Senate Hearings, created doubt as to whether the concept of hearings "required by law" afforded sufficient predictability as to the application of the proposed legislation. For, thereafter, all of the administrative procedure bills which received serious consideration referred to hearings "required by statute".

Further, the legislative proceedings immediately preceding enactment of the Administrative Procedure Act make it abundantly clear that Sections 5, 7, 8 and 11 are to apply only where Congress in some other statute has *specifically* required an opportunity for a hearing.[12]

The practical importance of a literal interpretation.—In urging that the introductory clause of Section 5 of the Administrative Procedure Act be literally interpreted so as to make that section and Sections 7, 8 and 11, applicable only to cases in which Congress has expressly and in terms required an opportunity for an administrative hearing, the Government is concerned with considerations which go beyond the instant type of case. It is important that both private persons and administrative agencies shall be able to determine readily and with certainty the administrative proceedings to which the Act is applicable. Because the application of the Act involves no constitutional right, there is presented solely a question of what Congress intended. Since the Act became effective, all questions as to the applicability of Sections 5, 7, 8 and 11 have been re-

[12] We can find no specific explanation for the final omission of an express exception for proceedings relating to "the admission or control of aliens." During the extensive informal discussions which preceded the enactment of the Administrative Procedure Act, it may have been concluded that in the light of the general change in language discussed above there was no longer need for an express exception for deportation proceedings.

solved by determining whether Congress, in the substantive statute involved, had expressly required an opportunity for an administrative hearing. Where it had not, it was concluded that those sections were not applicable. Thus, the Department of Justice concluded that deportation proceedings were not subject to the Act because the Immigration Act does not expressly require an opportunity for a hearing. Similarly, the Post Office Department has concluded that mail fraud proceedings (39 U. S. C. 259, 732) are not subject to the Administrative Procedure Act. See *Bersoff* v. *Donaldson*, 174 F. 2d 494 C. A. D. C.). Moreover, it can be expected that in the future new regulatory statutes will be enacted by the Congress and will present questions as to the applicability of the Act. Where Congress has not specifically required a hearing, it is not always certain where and when the Constitution may require opportunity for a hearing. Thus, the application of the Administrative Procedure Act can be predicted safely only if the key phrase "required by statute" is given a literal interpretation as suggested by the legislative history.

The administrative construction.—At all times since the enactment of the Administrative Procedure Act, the Immigration and Naturalization Service of the Department of Justice has publicly taken the position that deportation proceedings are not subject to Sections 5, 7, 8 and 11 of the

Act.[13] In fact, thousands of deportation hearings have been conducted in the same manner as in the instant case. Similarly, the Post Office Department, relying upon a similar construction of Section 5, has continued to conduct mail fraud hearings without hearing examiners appointed in accordance with Section 11. Also, the Department of Justice has taken the general position that "The legislative history makes clear that the word 'statute' was used deliberately so as to make sections 5, 7 and 8 applicable only where the Congress has otherwise *specifically* required a hearing to be held. * * * In cases where a hearing is held, although not required by statue, but as a matter of due process or agency policy or practice, sections 5, 7 and 8 do not apply." *Attorney General's Manual on the Administrative Procedure Act* (1947) p. 41.

B. CONGRESS HAS NOT SPECIFICALLY REQUIRED AN OPPORTUNITY FOR AN ADMINISTRATIVE HEARING IN DEPORTATION CASES

It is undisputed that the Congress has never specifically required an opportunity for an administrative hearing in proceedings for the deportation of an alien. The development of minimum procedural standards governing deportation proceedings has been entirely judicial, deriving

[13] See remarks of Commissioner of Immigration Carusi in February, 1947, reprinted in *The Federal Administrative Procedure Act and the Administrative Agencies* (New York University, 1947) pp. 296–297.

from the due process clause of the Fifth Amendment. Section 16 of the Immigration Act of 1917, 8 U. S. C. 152, provides for an "examination" of aliens arrested in deportation proceedings. Section 19 (a) of the same statute, 8 U. S. C. 155 (a) merely directs that any alien who is in the United States in violation of law "shall, upon the warrant of the Attorney General, be taken into custody and deported" and that "the decision of the Attorney General shall be final." Section 20, 8 U. S. C. 156, recognizes (but does not direct) that hearings may be given in deportation cases, by authorizing the release of the alien on bond pending final disposition of his deportation proceeding, conditioned upon his production "when required for a hearing or hearings in regard to the charge upon which he has been taken into custody." But there is no explicit declaration in the immigration statutes *requiring* that a hearing be granted in each deportation case and that the adjudication must be made on the record of such hearing. The oblique reference found in Section 20 cannot be regarded as a statutory requirement that a hearing be held.

It is indisputable, of course, that aliens subjected to deportation proceedings always have been accorded hearings on the alleged grounds for deportation. But such hearings have emerged as a necessary corollary to the traditional precepts of fair play enunciated and developed by the

courts in applying the constitutional mandate of due process, rather than from any direct statutory requirement. The general observations cited in the petition (p. 11) do not in any way reject this concept. *The Japanese Immigrant Case,* 189 U. S. 86, 100, 101 (1903) considered a contention that the deportation statutes were unconstitutional because they did not provide for a hearing. The Court rejected that contention, concluding that a hearing was not precluded by the statute and that such a hearing was required by due process. The language quoted at p. 11 of the petition does not include the following significant observation (p. 100):

> Those [immigration] acts do not necessarily exclude opportunity to the immigrant to be heard, when such opportunity is of right.

The opinion of the Court, when considered in context, merely declares that the omission to provide specifically for a hearing does not bar it, and that the statute and Constitution, read together, supply full assurance that a fair hearing will be granted in each deportation proceeding. Moreover, in that case the Court found that the alien actually had been granted a hearing and that such hearing, though summary, had satisfied due process requirements. Essentially, this was the only substantial issue resolved by the Court in that case.

The quotation from *Bridges* v. *Wixon*, 326 U. S. 135, 160 (1945) relied on by petitioner (at p. 11) does not appear in the opinion of the Court but in Justice Murphy's concurring opinion, which was not adopted by any other member of the Court. And Justice Murphy's comment evidently was directed to the effect of a specific deportation statute rather than to a determination as to whether the requirement of a fair hearing was a part of the statute itself.

We believe that the true reading of many decisions of this Court is that the requirement of a hearing in deportation proceedings is a concomitant of due process, rather than a specific requirement of the deportation statute. Thus, in *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103 (1927) the alien's appeal to this Court rested on a contention that he had been denied rights guaranteed by the federal Constitution, rather than by statute (p. 105). Although the appeal was unsuccessful, this Court stated, at p. 106:

> Deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process which may be corrected on *habeas corpus*.

And in *Kwock Jan Fat* v. *White*, 253 U. S. 454, 459, 464 (1920)[14] this Court observed that in re-

[14] This was an exclusion case but the court's comments are intended to be generally applicable.

viewing the actions of immigration officers, it considered

> the question whether the hearing accorded to the petitioner was unfair and inconsistent with the fundamental principles of justice embraced within the conception of due process of law * * *. The acts of Congress give great power to the Secretary of Labor[15] * * *. It is a power to be administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. It is the province of the courts, in proceedings for review, within the limits amply defined in the cases cited, to prevent abuse of this extraordinary power * * *.

Other decisions containing similar expressions are *Bilokumsky* v. *Tod,* 263 U. S. 149, 157 (1923); *Kessler* v. *Strecker,* 307 U. S. 22, 34 (1939); *Tisi* v. *Tod,* 264 U. S. 131, 132 (1924); *Low Wah Suey* v. *Backus,* 225 U. S. 460, 468 (1912); *Tang Tun* v. *Edsell,* 223 U. S. 673, 681 (1912).

Petitioner contends that the due process requirement of an opportunity for a hearing in deportation proceedings is as much a part of the immigration statute as though it had been spe-

[15] Authority in deportation cases now is confided to the Attorney General under Reorganization Plan No. V, 5 F. R. 2223, effective June 14, 1940, 5 F. R. 2132.

cifically prescribed by the Congress. Certainly that right to a hearing is one "required by law" within the meaning of the administrative procedure bills which were before the Congress in 1941. But Congress deliberately abandoned this phrase in favor of "required by statute", with the obvious purpose of making certain and predictable the application of the Administrative Procedure Act. While petitioner cites such cases as *A. F. of L.* v. *Watson,* 327 U. S. 582 for the proposition that the word "statute" when used in Federal statutes includes "Constitution", those cases stand for no such sweeping proposition, but rather for a rule of construction that in certain contexts the word "statute" includes legislative action in the form of constitutional provision and administrative rules. Such a guide to interpretation obviously has no application here where it is clear that the reference in Section 5 of the Administrative Procedure Act to hearings "required by statute" related only to hearings specifically required by Congress.

C. THE SUBSEQUENT JUDICIAL AND LEGISLATIVE HISTORY

On May 5, 1948, Judge Goldsborough held, in *Eisler, et al.* v. *Clark,* 77 F. Supp. 610 (D. D. C.), that deportation hearings are governed by Sections 5 and 11 of the Administrative Procedure Act. He concluded, as the petitioner here contends, "that the courts have read due process into the Act

[the Immigration Act] and due process means a hearing, and that therefore hearing is an integral part of the Deportation Act; in fact, just as much as if the Act itself in words stated that a hearing should be held." This was the first judicial decision on this question.

It was obviously important for this question to be determined finally as soon as possible. Accordingly, the Department of Justice asked Congress for legislation specifying that deportation proceedings should not be subject to the Administrative Procedure Act. Bills were introduced, S. 2755 and H. R. 6652, both 80th Cong., 2d Sess., which would have exempted from all of the provisions of the Administrative Procedure Act except Section 3 "functions or proceedings authorized or required pursuant to the immigration or nationality laws." H. R. 6652 was reported favorably on June 2, 1948, by the House Committee on the Judiciary, together with a report, H. Rep. 2140, 80th Cong., 2d Sess., discussing the problem at length. A subcommittee of the Senate Committee on the Judiciary held hearings on S. 2755. Representatives of the Department of Justice took the position that the *Eisler* decision was erroneous but that there was need for early clarification by legislation.[16] S. 2755 was

[16] Unpublished testimony on file with the Committee, pp. 55, 58, 80–82. It is interesting to observe that Mr. Ashley Sellers, Chairman, National Committee, Section on Administrative Law, American Bar Association (which actively

favorably reported on June 10, 1948, but in a form which would have amended the Immigration Act to direct squarely that deportation hearings be conducted by immigrant inspectors. Congress adjourned on June 19, 1948, without taking further action on either bill.

However, beginning with the unreported decision of Judge Coxe in *Fajardo* v. *United States* (S. D. N. Y.) in June 1948, reaching a conclusion directly opposite to that of the *Eisler* case, and Judge Holtzoff's decision in the instant case in July 1948, every Federal court which has considered the question has refused to follow *Eisler* v. *Clark* and has held that deportation hearings need not be conducted by hearing examiners appointed pursuant to Section 11 of the Administrative Procedure Act." Many of these subsequent decisions were based upon Section 7 (a) of the Administrative Procedure Act. In addition, however, in *Bersoff* v. *Donaldson,* 174 F. 2d 494, the Court of Appeals

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sponsored the proposed legislation culminating in the Administrative Procedure Act) expressed the opinion, in testimony before the Senate Judiciary Committee, that the *Eisler* case was erroneously decided. *Hearings before Senate Judiciary Subcommittee on Immigration and Naturalization on S. 2755, 80th Cong., 2d Sess. (1948)*, p. 102. (Herein referred to as Senate Hearings (1948).)

[11] The *Eisler* case is now pending on appeal in the Court of Appeals for the District of Columbia under the name of *Potash* v. *McGrath.* Certiorari in advance of judgment by the Court of Appeals was denied by this Court on November 14, 1949, No. 366.

for the District of Columbia held that mail fraud proceedings were not subject to Sections 5, 7 and 8 because the mail fraud statutes "do not in terms require a hearing". For this reason, the proposed clarifying legislation referred to above became less urgent. The substance of H. R. 6652 referred to above was reintroduced in the 81st Congress as part of H. R. 10, Section 2 of which provides that "Nothing in the provisions of Sections 5, 7, 8 and 10 of the [Administrative Procedure Act] shall be applicable to the provisions of any law relating to the immigration, exclusion, expulsion, or registration of aliens." H. R. 10 was favorably reported on August 4, 1949, by the House Committee on the Judiciary and is pending before the House. H. Rep. 1192, 81st Cong., 1st Sess., p. 11.

Thus, the Congress, with specific knowledge that Sections 5, 7 and 11 of the Administrative Procedure Act have been construed by the Service as not applying to deportation proceedings, has taken no action indicating disagreement with that interpretation. To the contrary, when the administrative construction was initially rejected in *Eisler* v. *Clark*, supra, is at least arguable that Congress was prepared to specifically confirm the administrative construction by clarifying legislation.

While Section 5 of the Administrative Procedure Act does not except deportation hearings by name, it seems clear that Congress was aware

that the application of the Act to deportation proceedings would create excessive administrative difficulties. There is no reason to believe that Congress was dissatisfied with the conduct of deportation proceedings. During the 1941 Senate hearings, Congress was fully informed of the desirability of keeping the organization of the Immigration and Naturalization Service flexible in order to meet diversified needs and changing conditions. The reference in the 1945 House Report (*supra,* p. 28) to the conclusions reached in the 1941 Senate Hearings (*supra,* p. 24) indicate that Congress intended to avoid the practical difficulties and financial burdens that might be entailed if immigration procedures were required to conform with the Administrative Procedure Act. The testimony of Major Schofield and other available evidence persuaded Congress that these were not the formalized types of hearings within its contemplation in enacting this legislation. During the fiscal year 1948 there were 31,540 deportation hearings and deportation actually occurred in 20,371 cases. *Annual Report,* Commissioner of Immigration and Naturalization (1948), p. 23. Current hearings are being scheduled at a lower rate, somewhat under 2,000 monthly. In the great preponderance of these hearings, like that in the instant case, the factual and legal issues are relatively simple and are decided expeditiously.

The Immigration and Naturalization Service functions throughout the continental United States, and in Alaska, Hawaii, Puerto Rico, and the Virgin Islands. Its operations are conducted under varying conditions—at seaports facing the Atlantic and Pacific Oceans and the Gulf of Mexico, along the land frontiers and the Great Lakes, and in the internal areas of the United States. The majority of deportations concern migrant laborers from adjacent countries who are unable to raise bail, and whose deportation cases must be decided with dispatch in order to avoid prolonged incarcerations.

In the different regions of operation there are varying workloads and administrative problems. For example, in the large seaports and at some land border points, deportation hearings arise in substantial volume and it is feasible to assign to such hearings a regular staff of hearing examiners. In 90% of the field offices, however, deportation hearings are infrequent and do not require the full time services of an immigrant inspector. At such offices immigrant inspectors perform other duties, such as the inspection of arriving aliens, when not conducting deportation hearings. A requirement that hearing examiners be restricted only to the hearing of deportation cases would result in a loss of time, money and mobility, and would unnecessarily prolong the

period of detention endured in many cases while awaiting a final disposition.[18]

We believe the evidence is overwhelming that Congress took into account all of these factors, that it chose the language in Section 5 with great care, that it unquestionably considered deportation proceedings in framing its exemptions, and that it desired to limit the application of the procedural provisions of the Administrative Procedure Act to adjudications specifically required by statute to be made after a hearing. Consequently, under the explicit language of Section 5, fortified by an understanding of the legislative history and purpose, we believe the conclusion is inescapable that deportation proceedings are exempt from the operation of the procedural provisions of the Administrative Procedure Act.

II

THE EXCEPTION IN SECTION 7(A) OF THE ADMINISTRATIVE PROCEDURE ACT FOR THE CONDUCT OF PROCEEDINGS BY OFFICERS SPECIALLY PROVIDED FOR BY STATUTE PERMITS IMMIGRANT INSPECTORS TO CONDUCT DEPORTATION HEARINGS

Section 7 (a) of the Administrative Procedure Act requires that adjudicatory hearings subject

[18] Also meriting consideration is an estimate that if the petitioner herein prevails it will be necessary to reprocess and redetermine approximately 10,000 deportation orders. *Senate Hearings* (1948), p. 55.

to the Act be conducted by the head of the agency concerned or by a hearing examiner appointed in accordance with Section 11. However, Section 7 (a) also provides that

> nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute.

This exception to Section 7 (a) provides an independent basis for affirming the decision of the court below. The Government here contends that Section 16 of the Immigration Act of 1917, 8 U. S. C. 152, provides for the conduct of deportation proceedings by immigrant inspectors within the meaning of the quoted exception to Section 7 (a). If this contention is correct, the requirement of Section 11 of the Administrative Procedure Act for rotation of hearing examiners appointed pursuant to that section is obviously inapplicable. Also, the express exception of Section 7 (a) for certain statutory hearing officers necessarily carries with it as much of an exception from the general separation of functions requirements of Section 5 (c) as is necessary to give effect to the express exception.

In Point I above, it was contended that hearings in deportation proceedings, although required by due process, have not been specifically required by Congress, and that therefore such

proceedings were in no way subject to the provisions of Sections 5, 7, 8 and 11 of the Administrative Procedure Act. If, however, it is held that deportation hearings are required by statute, then we believe that it is difficult to escape the conclusion that Congress has also "specially provided for" the conduct of such hearings by immigrant inspectors. There is nothing inconsistent in these alternative positions, since Section 16 of the Immigration Act of 1917, enacted long after the due process requirement of opportunity for hearing was applied to deportation proceedings, is concerned solely with furnishing immigrant inspectors with enforcement powers rather than with conferring procedural rights upon aliens. In effect, Section 16 vests solely in immigrant inspectors the power to effectively conduct whatever hearings may be required by the Fifth Amendment in deportation proceedings.

It should also be noted that the exception in Section 7 (a) for certain statutory hearing officers is not necessarily an exception from all of the provisions of Sections 5, 7 and 8. Where the exception of Section 7 (a) is applicable, the administrative agency involved is freed from the necessity of using hearing examiners appointed pursuant to Section 11.[19] As will be discussed

[19] This is not a general loophole from the general requirements of Sections 7 (a) and 11, because few Federal regulatory statutes require or provide for the conduct of hearings by a particular officer or class of officers. See *infra*, p. 53, fn. 26.

later, hearing officers within this exception are also excepted from the general separation of functions requirements of Section 5 (c) to the extent necessary to give effect to the specific exception of Section 7 (a). It is unnecessary to determine in this case whether the other provisions of Sections 5, 7 and 8 remain applicable to the administrative proceedings in question. If this Court holds that deportation hearings are required by statute within the meaning of the introductory clause of Section 5, but that pursuant to Section 7 (a) such hearings may be conducted by immigrant inspectors notwithstanding the provisions of Section 5 (c), then it may be that Section 8 and the other parts of Sections 5 and 7 will be applicable to deportation proceedings.

However, it is believed that the existing deportation procedures are in substantial, if not literal, compliance with these latter provisions. In any event, no failure to comply with such provisions is asserted by petitioner. Accordingly, the decision below can be affirmed even on the basis of the limited exception provided by Section 7 (a). In fact, the actual effect upon deportation proceedings generally would be the same as a holding that such proceedings were in no way subject to Sections 5, 7, 8 and 11, because the only real issue in all these cases is whether deportation hearings must be conducted by a hearing examiner appointed in accordance with Section 11.

A. SECTION 16 OF THE IMMIGRATION ACT OF 1917 "SPECIFICALLY PROVIDES" FOR THE CONDUCT OF DEPORTATION PROCEEDINGS BY IMMIGRANT INSPECTORS WITHIN THE MEANING OF SECTION 7 (A) OF THE ADMINISTRATIVE PROCEDURE ACT

The Court of Appeals and the District Court below, the Court of Appeals for the Second Circuit, and a number of district courts throughout the country, have held that by Section 16 of the Immigration Act of 1917 Congress has "specially provided" for the conduct of deportation hearings by immigration inspectors within the exception of Section 7 (a) of the Administrative Procedure Act.[20] No court has reached a contrary conclusion.[21]

[20] In addition to the decisions in the instant case, cases which have ruled directly on this point are *Azzolini* v. *Watkins*, 172 F. 2d 897 (C. A. 2, 1949); *Lee Wo Shing* v. *Clark*, 175 F. 2d 194 (C A. 2, 1949), certiorari applied for; *Yanish* v. *Wixon*, 81 F. Supp. 499 (N. D. Cal., 1948), appeal pending; *Valenti* v. *Clark*, 83 F. Supp. 167 (D. D. C. 1949); *Prince* v. *Commissioner*, unreported, N. Dist. of Ohio, E. D., 1949, Civ. No. 25968; *Chow Kau* v. *Clark*, 83 F. Supp. 969 (D. D. C. 1949); *Chin Fat Neu* v. *Zimmerman*, unreported, E. Dist. of Pa. 1949, Civ. M–1282; *Ottesen* v. *Shaughnessy*, unreported, S. Dist. of N. Y. 1949, Civ. 50–5; *Perfumo* v. *Shaughnessy*, unreported, S. Dist. of N. Y. 1949, Civ. 49–569. In *Eisler* v. *Clark*, *supra*, Judge Goldsborough did not rule on the Section 7 (a) point. In addition, various courts have ruled that boards of special inquiry, which conduct exclusion proceedings, likewise are exempt under sec. 7 (a); *Johnson* v. *Watkins*, 170 F. 2d 1009 (C. A. 2, 1948); *Ex parte Wong So Wan*, 82 F. Supp. 60 (N. D. Cal., 1948); *Frisch* v. *Miller*, unreported, D. C., Fla. 1949, No. 3192–M–Civil. In *Johnson* v. *Shaughnessy*, 336 U. S. 806 (1949) this Court found it unnecessary to rule on the latter question in disposing of the case.

Sec. 16 of the Immigration Act of 1917, 8 U. S. C. 152, expressly confers upon immigrant inspectors authority to conduct the "examination of aliens arrested within the United States under this Act" and "to administer oaths and to take and consider evidence touching the right of any alien to * * * reside in the United States, and, where such action may be necessary, to make a written record of such evidence." We agree with the courts below, and the other courts which have ruled on the question, that this

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Typical comments have been: "It is manifest from a review of the Congressional proceedings antedating the enactment of the Administrative Procedures Act, and the clear context of the Act itself, that it was not the intention of Congress to interfere with or usurp traditional statutory proceedings of this nature conducted by the Immigration Service" *Yanish* v. *Wixon*, *supra*. "After a consideration of its purpose and scope, the Court is of the opinion that the Administrative Procedure Act does not control deportation proceedings by the Attorney General. This is so because the Administrative Procedure Act both expressly and impliedly excludes matters of this nature from its application" *Yiakoumis* v. *Hall*, 83 F. Supp. 469 (E. D. Va., 1949), appeal pending.

[21] Not involved herein is another currently litigated issue under the Administrative Procedure Act—whether sec. 10 of the Administrative Procedure Act, 5 U. S. C. 1009, has altered existing forms of judicial review of immigration orders. *Trinler* v. *Carusi*, 166 F. 2d 457, 168 F. 2d 1014 (C. A. 3, 1948); *Yanish* v. *Wixon*, 81 F. Supp. 499 (N. D. Cal., 1948); *Valenti* v. *Clark*, 83 F. Supp. 167 (D. D. C., 1949); *Yiakoumis* v. *Hall*, *supra*; *Prince* v. *Commissioner*, *supra*.

grant of authority fits exactly within the exception of Section 7 (a).

Petitioner contends that Sec. 16 of the Act of 1917 bears only on procedures relating to the admission, and not the deportation, of aliens. Similar contentions have been advanced and rejected on other occasions in the past. *Loufakis* v. *United States,* 81 F. 2d 966 (C. A. 3, 1936); *Graham* v. *United States,* 99 F. 2d 746 (C. A. 9, 1938); *Ex parte Kurth,* 28 F. Supp. 258 (S. D. Cal., 1939); *Azzolini* v. *Watkins,* 172 F. 2d 897 (C. A. 2, 1949). Such a contention defies the consistent administrative interpretation of the statute over all the years of immigration enforcement, which certainly is entitled to the greatest weight. *Costanzo* v. *Tillinghast,* 287 U. S. 341 (1932); *Lucas* v. *American Code Co.,* 280 U. S. 445 (1930). It is definitely not true, as petitioner declares (p. 17), that the Attorney General and the Immigration and Naturalization Service have never regarded Sec. 16 as relating to formal deportation proceedings. Indeed, that section provides the only authority for immigrant inspectors to administer oaths and to take testimony in deportation proceedings.[22] *United States* v. *Doshen,* 133 F. 2d 757

[22] This interpretation is confirmed by the so-called *Dimock Report,* in the quotation which appears at pp. 16–17 of the petition.

(C. A. 3, 1943).[22] And petitioner has not taken into account the many diverse provisions of Sec. 16, relating to entry *and* expulsion proceedings, subpoenas, and criminal penalties. Moreover, petitioner's attempted construction overlooks, in our view, the plain language of Sec. 16 itself, which speaks of an "examination" of aliens believed to be illegally in the United States, *i. e.*, aliens who may be deported but not excluded. Clearly these specifications make immigrant inspectors "officers specially provided for" by statute for the conduct of deportation proceedings within the meaning of Sec. 7 (a) of the Administrative Procedure Act.

Petitioner also contends that the exception of Section 7 (a) relates only to statutory hearing officers possessing special and unique qualifications not possessed by immigrant inspectors. While isolated statements to that effect may be found in the legislative history (see Pet. p. 18), this is not what Congress did in Section 7 (a). That section clearly provides that administrative

[22] Petitioner appears to base much of his contention on the ground that the powers vested by Section 16 in immigrant inspectors may be exercised only for the purposes of that section, in that Section 16 of the Immigration Act of 1917, as set forth in 8 U. S. Code 152, refers to "aliens arrested within the United States *under this section*." However, as originally enacted, 39 Stat. 886, the words used are "*under this Act*," thereby including aliens arrested for deportation pursuant to Section 19 of that Act. [Emphasis supplied.]

proceedings governed by the Administrative Procedure Act may continue to be conducted "by or before boards or other officers specially provided for by or designated pursuant to statute." The natural and literal reading of this language is confirmed by legislative history indicating a clear purpose of Congress not to repeal *pro tanto* other statutes in which it had specifically required or authorized the conduct of hearings by particular officers or classes of officers.

The exception in Section 7 (a) originated in recognition of the fact that some Federal regulatory statutes provided for the participation of state officials in the conduct of hearings.[34] Thus, the 1941 bills[35] embodying the recommendations of the Attorney General's Committee on Administrative Procedure excepted from their hearing examiner requirements hearings which by statute were conducted by a state officer. As late as 1945, when H. R. 1203 was the subject of hearings before the House Committee on the Judiciary, the exception merely included hearings before "State representatives as authorized by statute." During those hearings, Commissioner Aitchison of the Interstate Commerce Commission pointed out that Section 7 (a) as it then read would repeal Section

[34] See, for example, Section 13 (3) of the Interstate Commerce Act, 49 U. S. C. 13 (3).

[35] Section 309 (b) of S. 674 and Section 301 of S. 675; both 77th Cong., 1st sess. (1941).

17 (2) of the Interstate Commerce Act (49 U. S. C. 17 (2)) which authorizes the Commission to hold hearings before boards of three or more "examiners, directors or assistant directors of bureaus, chiefs of sections, and attorneys." House Hearings, pp. 70–73, S. Doc. 248, pp. 116–120.

In June 1945, the Senate Committee on the Judiciary issued a comparative committee print in which the Section 7 (a) exception was broadened to refer to "officers specially designated by statute." Sen. Doc. 248, p. 28. If this language had been finally adopted, the exception might have been limited to cases in which a particular officer is designated specifically by a statute to conduct a particular type of hearing, as 19 U. S. C. 1641 requires that hearings to determine whether a customhouse broker's license should be suspended or revoked must be held by the collector or chief officer of the customs. It probably would not have met Commissioner Aitchison's objection. However, as reported by both Judiciary Committees, the bill provided, as finally enacted, an exception from the requirement of Section 11 hearing examiners for proceedings conducted "before boards or other officers specially provided for by or designated pursuant to statute." Under this broadened language, the exception clearly applies where a statute in terms requires or authorizes

an agency to designate a specific officer or employee or one of a specific class of officers to conduct a proceeding.[28] The clear purpose of this change to leave unaltered other statutory provisions authorizing the conduct of hearings by particular classes of officers, such as those enumerated in Section 17 of the Interstate Commerce Act, is confirmed by the following exchange during the Senate debate (Sen. Doc. 248, p. 307):

> Mr. REED. I confess a lack of understanding of the bill. * * * Over the years the Congress has laid down rules of procedure instructing the Interstate Commerce Commission as to how to act in certain cases in the matter of rate making, valuations, and orders. All that is prescribed by statute. Is there anything in this bill that would interfere with that procedure?

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[28] The Department of Justice analysis of S. 7 prepared for the Senate Committee on the Judiciary lists the following examples (Sen. Doc. 248, pp. 227-228):

> (1) joint hearings before officers of the Federal agencies and persons designated by one or more States, (2) where officers of more than one agency sit, (3) quota allotment cases under the Agricultural Adjustment Act of 1938, (4) marine casualty investigation boards, (5) registers of the General Land Office, (6) special boards set up to review the rights of disconnected servicemen (38 U. S. C. 693h) and the rights of veterans to special unemployment compensation (38 U. S. C. 696h), and (7) boards of employees authorized under the Interstate Commerce Act (49 U. S. C. 17(2)).

Mr. McCarran. There is nothing in this bill which would interfere with such procedure.

* * * * *

Mr. Reed. And it would not change its (the Commission's) method and rule of doing business when the method and rule is founded on statutory authority?

Mr. McCarran. That is correct.

Mr. Reed. I thank the Senator.

Mr. McCarran. Let me say to the Senator from Kansas that that has been one of the great problems we have had to work out in the long months of study which we have devoted to the bill. *We did not wish to disrupt or change anything that was statutory;* and yet we wanted to establish something which would prescribe and define the avenue by which the individual citizen could gain access to a public agency which would touch his private life, and we wished to find for him a way through the procedure. [Emphasis supplied.]

Here, Congress in Section 16 of the Immigration Act has clearly provided for the conduct of deportation proceedings before immigrant inspectors. In fact, Section 16 vests solely in immigrant inspectors the powers necessary for the effective conduct of such proceedings.

B. THE EXCEPTION TO SECTION 7 (A) WHICH PERMITS THE CONDUCT OF DEPORTATION HEARINGS BY IMMIGRANT INSPECTORS ALSO EXEMPTS THEM FROM THE GENERAL REQUIREMENTS OF SECTION 5 (C) TO THE EXTENT NECESSARY TO GIVE EFFECT TO THE EXCEPTION

Petitioner's final contention is that even if the exception to Section 7 (a) permits immigrant inspectors to conduct deportation hearings, it exempts them only from the provisions of Section 11 as to the selection and status of hearing examiners, and not from the separation of functions requirements of Section 5 (c). Specifically, it is asserted that there was a failure to comply with the requirement of the second sentence of Section 5 (c) that the officer presiding at the hearing shall not "be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency." (R. 3.)

It is admitted that the deportation hearing in this case was conducted by an immigrant inspector who was under the general supervision of an officer of the Immigration and Naturalization Service who also supervises the performance of investigating functions in deportation cases. Accordingly, if this provision of Section 5 (c) were applicable here, it would be arguable that

the hearing was conducted in violation of section 5 (c)."

However, it seems clear that this provision of Section 5 (c) is not applicable to the conduct of hearings by boards or other officers "specially provided for" by statute. It is illogical to assume that Congress desired to permit certain types of officers designated by other statutes to continue to preside over hearings, and yet simultaneously provided that the relationship with the agency by which Congress identified and designated them should preclude them from performing the functions of hearing officers. In any event, the express language of Section 7 (a) rebuts petitioner's contention. It provides that "*nothing in this Act shall be deemed to supersede the conduct* of specified classes of proceed-

[11] It is not true under current practice, however, that immigrant inspectors generally conduct investigations preliminary to the institution of deportation proceedings. At present a corps of 462 investigators, as distinguished from immigrant inspectors, stationed throughout the United States, conducts at least 90% of all investigations. In addition members of the Immigration Border Patrol receive investigative assignments in areas proximate to the land borders. Only in small offices, to which no investigators are allocated because of the meager volume of work, is it sometimes necessary for immigrant inspectors to undertake investigations. And the regulations forbid an immigrant inspector who conducted an investigation to act as hearing officer in that case, without the alien's consent. 8 CFR 150.6 (b). The present authorized force of immigrant inspectors aggregates 1173, of whom 1018 are assigned to the inspection of arriving aliens and 155 to deportation hearings.

ings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute" (emphasis supplied). It would be difficult to use words more appropriate for extending to such proceedings such an exemption from the requirement of the *Act*, and not merely of that section, as would enable such boards and officers effectively to "conduct" such proceedings.

This plain and literal construction is confirmed by the legislative history. As noted above, when the administrative procedure bill, H. R. 1203, was before the House Committee on the Judiciary, Section 7 (a) then provided that "There shall preside at the taking of evidence * * * State representatives as authorized by statute * * *". It would seem that as thus constructed, Section 7 (a) would have left such State officers subject to every other provision of the Act. During the hearings before that Committee, the broader problems of officers authorized by other statutes to conduct hearings were raised (*supra*, pp. 51–52). Thereafter, Section 7 (a) was completely rewritten to provide as enacted that "nothing in this Act shall be deemed to supersede the conduct" of "proceedings" by officers "specially provided for" by statute. This change in language makes it clear that the exception was intended to permit such officers to act without changing their status in the employing agency. Thus, the requirement of Section 5 (c) here invoked, which would radically

alter the relationship of an immigrant inspector to the Service, is clearly not applicable.

It seems clear, therefore, that immigrant inspectors may function as hearing officers in deportation cases notwithstanding that they are under the supervision or direction of officers who may be said to be performing investigating or prosecuting functions.[23]

CONCLUSION

We believe that the decision below should be sustained, either on the ground that hearings in

[23] No other contentions are made with respect to the applicability of Section 5 (c). It may be noted that as a matter of good administration, the Immigration and Naturalization Service follows to a great extent the separation of functions principles of that subsection. In the larger district offices, the immigrant inspectors who conduct deportation hearings are engaged in that work full time, and are under the immediate supervision of officers who have no investigating or prosecuting duties. Where, in a smaller office, the same inspector both conducts hearings and investigates cases, he may not preside at the hearing in a deportation case which he has investigated without the alien's consent. 8 CFR 150.6 (b).

At the higher levels of adjudicative responsibility, however, the delineation of functions is now complete. In the Central Office, where the case is initially decided, there is an Adjudications Division, directed by an Assistant Commissioner, which considers and determines deportation cases. That Division has no allotted functions extraneous to adjudication. Investigations and prosecutions, at the Central Office level, are within the domain of the Enforcement Division, headed by an Assistant Commissioner. Of course, the Board of Immigration Appeals, which considers appeals from any deportation orders which may be issued by the Commissioner, acts entirely in an adjudicative capacity.

deportation cases are not required by statute within the meaning of Section 5 and are therefore excepted from all of the provisions of Sections 5, 7, 8 and 11, or on the ground that Section 7 (a) excepts the conduct of deportation proceedings from the requirements of Sections 5 (c), 7 and 11 here invoked. Accordingly, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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Supreme Court of the United States

OCTOBER TERM, 1949.

No. 154.

WONG YANG SUNG, *Petitioner,*

vs.

J. HOWARD MCGRATH, ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, UNITED STATES COMMISSIONER OF IMMIGRATION AND NATURALIZATION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF OF RISS & COMPANY, INC., AMICUS CURIAE.

PRELIMINARY STATEMENT.

Riss & Company, Inc. is a common carrier by motor vehicle in interstate commerce, holding extensive certificate authority for its operations from the Interstate Commerce Commission. The Company has secured the requisite consents of the parties to this proceeding to file this brief as amicus curiae.

This brief is filed because of the importance of the application of the adjudicatory provisions of the Administrative Procedure Act, 5 U.S.C. §§1004, 1006, 1007, to the proceedings of various administrative agencies and tribunals including the Interstate Commerce Commission.[1]

OPINIONS BELOW.

The *per curiam* opinion of the Court of Appeals (R. 8) is reported at 174 F. 2d 158. The opinion of the District Court is reported at 80 F. Supp. 235.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 4, 1949. The petition for a writ of certiorari was granted on October 10, 1949. Jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

The question considered in this brief is: Whether the hearing accorded an alien in a deportation case is a hearing "required by statute" within the meaning of Section 5 of the Administrative Procedure Act, 5 U.S.C. §1004.

STATUTES INVOLVED.

Sections 16 and 19 of the Immigration Act of February 5, 1917, as amended, 39 Stat. 885, 889, 8 U.S.C. §§152, 155, and Sections 4, 5, 7, 8, 10 and 11 of the Administrative Procedure Act of June 11, 1946, 60 Stat. 238-243, 5 U.S.C. §§1003, 1004, 1006, 1007, 1009, 1010, are set out in the Appendix to this brief *infra*, pp. 21-29.

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[1] An appeal is pending in the United States Court of Appeals for the District of Columbia Circuit in an action brought by Riss & Company, Inc., to require the Interstate Commerce Commission to comply with the provisions of Sections 5, 7 and 8 of the Administrative Procedure Act in proceedings under Section 207 of the Interstate Commerce Act, 49 U.S.C. §307 on application for certificate of public convenience and necessity. The District Court held (unreported decision) that these proceedings were not subject to Section 5 of the Act. See *Riss & Company, Inc.* v. *Interstate Commerce Commission, et al.* No. 10167.

STATEMENT.

Petitioner is a citizen of China who has resided in the United States since April 21, 1946. He was arrested in deportation proceedings on October 14, 1947, on a warrant issued the previous day. After hearings on December 11, 1947 and January 29, 1948, before a single Immigrant Inspector, his deportation was ordered on the charge that he had remained in the United States after legal admission for a period longer than permitted under the Immigration Laws. An appeal from the order of deportation was dismissed by the Board of Immigration Appeals on June 4, 1948.

A petition for *habeas corpus* filed on July 23, 1948, alleged that the hearing had not been conducted in conformity with the Administrative Procedure Act, 5 U.S.C. §§1004, 1010. On July 29, 1948, District Judge Holtzoff discharged the writ on the ground that deportation hearings were exempt from the Administrative Procedure Act under 5 U.S.C. §1006(a). On April 4, 1949, the United States Court of Appeals for the District of Columbia affirmed the decision of the District Court in a *per curiam* opinion.

SUMMARY OF ARGUMENT.

Sections 5, 7 and 8 of the Administrative Procedure Act are applicable to deportation proceedings of the Bureau of Immigration and Naturalization. Section 5 of the Administrative Procedure Act by its language covers every adjudication required by statute to be determined on the record after opportunity for agency hearing. The Immigration Act has long been held to require deportation proceedings to be determined on the record after opportunity for hearing. The argument made by respondents that the provisions of the Administrative Procedure Act relating to administrative adjudications are applicable only to those cases where the agency statute contains the word "hearing" cannot be supported in the light of the express terms

of the Act or its legislative history. The legislative history shows that it was the express purpose of Congress to apply Sections 5, 7 and 8 to all those administrative adjudications where a hearing is held before the administrative agency, and judicial review is limited to consideration of that proceeding. Indeed, a construction that Sections 5, 7 and 8 of the Act do not apply to such administrative proceedings as deportation would apparently grant to the alien a trial *de novo* by the courts. Moreover, such a construction would result in a sporadic and unequal application of the Administrative Procedure Act as between different agencies and destroy any uniformity in the application of its provisions.

ARGUMENT.

I.

The Importance of the Application of Section 5 of the Administrative Procedure Act, 5 U.S.C. § 1004.

The Court of Appeals and the District Court held that hearings in deportation proceedings were a "specified class of proceedings before officers specially provided for by or designated pursuant to statute" within the meaning of Section 7(a) of the Administrative Procedure Act. Both Courts apparently reached this conclusion because they construed Section 16 of the Immigration Act of February 5, 1917, 8 U.S.C. §152, as specially providing for deportation hearings to be held before Immigration Inspectors. It was concluded, therefore, that a deportation hearing need not be conducted by an examiner appointed and qualified under Section 11 of the Administrative Procedure Act. Accordingly, the hearings in this case were approved although held before an Immigration Inspector admittedly not separated from the investigative or prosecuting functions of the Immigration Service. The effect of Section 16 of the Immigration Act of 1917, and Section 7(a) of the Administrative Procedure Act is discussed at length in petitioner's brief and will not be discussed in this brief.

Respondents argue, however, an additional ground for sustaining the decision of the Court of Appeals based on a construction of Section 5 of the Administrative Procedure Act. Section 5 of the Act applies to administrative adjudications "required by statute to be determined on the record after opportunity for an agency hearing". They argue that deportation orders are not administrative adjudications required by statute to be determined on the record after opportunity for an agency hearing.

The argument rests upon the construction to be given to the phrase "required by statute" as used in Section 5. Respondents contend that this phrase literally limits the application of Section 5 to other statutes which, in terms, require a hearing. Thus, unless the statutory provision under which an administrative adjudication purports to be made contains the word "hearing", it is asserted that a hearing is not required by statute, irrespective of the judicial construction of such statute.

Respondents argue, therefore, that since a hearing on deportation is required only by necessary judicial construction of the Immigration Act and not by its literal phraseology, the provisions of the Administrative Procedure Act relating to adjudications are wholly inapplicable to deportation proceedings. On this ground, the construction to be given Section 7(a) of the Administrative Procedure Act is immaterial, since Section 7, relating to hearing officers and their powers, and Section 8, relating to agency decisions, are operative only if the administrative proceedings are subject to Section 5. Thus, it is argued that this Court may approve the use of Immigration Inspectors as hearing officers in deportation cases without regard to the construction to be given Section 7(a).

Section 5 of the Administrative Procedure Act is the keystone to the procedure specified in other sections regarding agency adjudications. If the adjudication is within Section 5 of the Act, the agency must comply with the procedure

detailed in Sections 5, 7 and 8. Where agency adjudications or rules are not required to be determined on the record after opportunity for an agency hearing, only the informal procedures specified in Sections 4 and 6 of the Administrative Procedure Act apply. Sections 4 and 6, unlike Sections 5, 7 and 8, do not provide for hearings before officers unconnected with the prosecuting or investigating functions of the agency, an opportunity to submit oral testimony or argument, decision on the record of the hearing, or other procedural rights given in Sections 5, 7 and 8 of the Act. Moreover, as will appear, Section 10 of the Administrative Procedure Act creates a substantial distinction in the extent of judicial review and in the functions of the reviewing court between proceedings subject to Section 5 and those where there is no statutory requirement for agency hearing. Section 10(e) (5) provides that, in any case reviewed on the record of a statutory administrative hearing, judicial review shall be limited to determining whether there is substantial evidence to support the decision of the agency. Section 10(e)(6), however, provides for a trial *de novo* of the facts in agency actions subject to judicial review where there is no statutory requirement of determination by the agency on the record of a hearing.

The Administrative Procedure Act thus creates a basic distinction between agency adjudications subject to Section 5 and those which are not. The distinction is important not only as to the type of hearing officer, but also as to the conduct of the hearing and the subsequent procedure in reaching an agency decision. It is present at every step in the adjudicatory process and in the extent and manner of judicial review.

In the present case, even though the hearing officer falls within the exception of 7(a) of the Act, there still remains the basic question of whether the alien is entitled to the other procedural safeguards given in Sections 5, 7 and 8 of the Act. Respondents contend that, in their view, these rights are not secured to the alien but that as a matter of

grace most of the procedures are followed. However, it is not denied by respondents that Section 5(c) of the Act, requiring separation of hearing officers from the prosecuting or investigative functions of the Immigration Service, has been ignored.

Riss & Company, Inc. submits that this argument by respondents, which was at least inferentially rejected by the Court of Appeals, cannot be sustained. The argument does violence to the plain terms of the Administrative Procedure Act and is in complete contradiction of the legislative history and expressed purposes of the Act. It is an argument which, if sustained by this Court, will vitally affect the application of the Administrative Procedure Act not only to deportation proceedings of the Immigration Service, but also to important proceedings of many other administrative agencies not now before this Court. For example, under the construction of Section 5, now advanced by respondents, the adjudication provisions of the Administrative Procedure Act would not apply to proceedings before the Interstate Commerce Commission involving applications for certificates of public convenience and necessity by interstate common carriers by motor vehicle,[2] or by common carriers by water,[3] or for the issuance of permits to contract carriers by motor vehicle,[4] or for the issuance of permits to contract carriers by water,[5] or for the issuance of permits authorizing operation as a freight forwarder,[6] or for the issuance of licenses authorizing operation as a broker of transportation.[7]

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[2] Part II Interstate Commerce Act §207; Act of August 9, 1935, 49 Stat. 551, 49 U.S.C. §307.

[3] Part III Interstate Commerce Act §309; Act of September 18, 1940, 54 Stat. 941, 49 U.S.C. §909.

[4] Part II Interstate Commerce Act §209; Act of August 9, 1935, 49 Stat. 552, as amended, 49 U.S.C. §309(b).

[5] Part III Interstate Commerce Act §309(g); Act of September 18, 1940, 54 Stat. 941, 49 U.S.C. §909(g).

[6] Part IV Interstate Commerce Act §410(c); Act of May 16, 1942, 56 Stat. 291, 49 U.S.C. §1010(c).

[7] Part II Interstate Commerce Act §211(b); Act of August 9, 1935, as amended, 54 Stat. 919, 49 U.S.C. §311(b).

The argument of respondents as to the construction of Section 5 is also important in the application of the Administrative Procedure Act to administrative rule making. Section 4 of the Act prescribes a general procedure of notice to interested parties and opportunity to participate through submission of written data, views or arguments. Section 4(b), like Section 5, however, provides that "where rules are required by statute to be determined on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply * * *"

II.

Section 5 Exempts Only Those Non-Statutory Hearings Granted as a Matter of Grace.

Although previous legislative proposals regarding administrative procedure had been made, the present Administrative Procedure Act may be traced to the work of the Attorney General's Committee on Administrative Procedure. This Committee, after exhaustively studying the administrative functions of the Federal Government, submitted its final report together with two minority reports. These reports show that the Committee members, both majority and minority, made no distinction between administrative adjudications where the relevant statutory authority of the agency, in terms, required a hearing, and those where the statute had been judicially construed to require a hearing. Indeed, both situations were treated equally and there was no attempt to identify or list the various statutes falling in either category. *Final Report of the Attorney General's Committee on Administrative Procedure* (1941), pp. 43-96. The reports, both majority and minority, show that most of the controversy centered around administrative adjudications. This was heightened in those cases where the Courts exercised only a limited scope of review and the decision of the agency was examined on the basis of substantial evidence in the record of

the agency hearing. *Final Report of the Attorney General's Committee on Administrative Procedure* (1941), pp. 78, 92, 208, 250.

An analysis of the legislative history demonstrates that the reference to "adjudication required by statute to be determined on the record after opportunity for agency hearing" in Section 5 was designed to eliminate only those matters of administrative routine and similar matters where a hearing traditionally or intentionally was not required. Moreover, it was understood by Congress that limiting Section 5 to cases where hearing was not required covered all formal adjudications except where existing law permitted a trial *de novo*. Section 5 was thus made applicable to those adjudications where the statute, in terms, or by necessary construction, required a hearing since the administrative hearing is the only opportunity afforded the parties to develop the facts of any particular case. This application of Section 5 is spelled out in detail in the legislative history of Section 5 and again in the legislative history of Section 10 relating to judicial review.

Section 10(e)(5) of the Act provides the standard of substantial evidence in judicially reviewing agency adjudications where the statute requires a hearing. Section 10(e)(6) provides that the standard of "unwarranted by the facts" will be applicable in a trial *de novo* in cases where the agency action is not required by statute to be made upon the record after opportunity for agency hearing. An opinion that there is no statutory requirement of a hearing within the meaning of the Administrative Procedure Act unless the statute, in terms, requires it, also raises the problem of a change in the long established mode of judicial review in those cases where the statute has necessarily been construed to require a hearing. *American Trucking Associations* v. *United States*, 326 U.S. 77; *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475. Only if the phrase, "required by statute," is read as including statutes which have been construed to require hearing can the Administrative Procedure Act be read as a harmonious whole and unreasonable results avoided.

It is evident from the statements during the debates and from the reports of the Committees that, if the statute does not require a hearing, then a trial *de novo* is available. Congressman Walter, Chairman, Sub-Committee of House Judiciary Committee, in charge of the bill in the House, during debate on Section 5, said:

> Section 5 relates to the judicial function of administrative agencies where they decide specific cases respecting compliance with existing law or redress under existing law. It applies, however, only where Congress by some other statute has prescribed that the agency shall act only upon a hearing and, even in that case, there are six exceptions. The requirements of section 5 are thus limited to cases in which statutes otherwise require a hearing because, where statutes do not require an agency hearing, the parties affected are entitled to try out the pertinent facts in court and hence there is no reason for prescribing informal administrative procedures beyond the requirements of section 6 * * * Sen. Doc. 248, 79th Cong., 2d Sess., p. 359.

Similarly in the Senate Judiciary Committee print of the bill, which contained explanatory remarks by the Committee, it is stated:

> Limiting application of the sections to those cases in which statutes require a hearing is particularly significant, because thereby are excluded the great mass of administrative routine as well as pensions, claims, and a variety of similar matters in which Congress has usually intentionally or traditionally refrained from requiring an administrative hearing * * * There should be no disposition to compel administrative hearings where Congress has not already so provided because, as pointed out below in connection with judicial review, the established law permits a trial *de novo* of the facts in all cases of adjudications where statutes do not require an administrative hearing. Sen. Doc. 248, 79th Cong., 2d Sess., p. 22.

In accordance with this basic purpose and intent, the Administrative Procedure Act in Section 10(e) provides in

categories (5) and (6) the standards of review of administrative action. Section 10(e)(5) provides "unsupported by substantial evidence *in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute*" (italics added) and Section 10(e)(6) provides "unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court." Category (5) was intended to restate the present standard of review where the hearing was held and record made before the agency. It is important to note, however, that the application of category (5) is limited to those cases where a hearing is required by the statute. The legislative history of these provisions shows that Congress intended that the phrase "required by statute" include all proceedings where a hearing was required to be held under the statute because if no hearing was required the parties were entitled to a trial *de novo* of the facts.

The operation of Section 10(e) is explained in the Senate Judiciary Committee Print, June 1945, as follows:

> The fifth category necessarily limits the substantial evidence rule to cases in which Congress has required an administrative hearing in which the administrative record may be made. Th sixth category expresses the correlative situation in which Congress has not provided by statute for an administrative hearing and consequently any relevant facts must be presented *de novo* to original courts of review * * * *It should be noted that the sixth category, in accordance with the established rule, would permit trial de novo to establish the relevant facts as to the applicability of any rule and as to the propriety of adjudications where there is no statutory administrative hearing.* (Italics added). Sen. Doc. 248, 79th Cong., 2d Sess., pp. 39, 40.

Similarly in the Report of the Senate Judiciary Committee on the bill, it is stated:

> The sixth category, respecting the establishment of facts upon trial *de novo*, would require the reviewing

court to determine the facts in any case of adjudication not subject to Sections 7 and 8.

Sen. Doc. 248, 79th Cong., 2d Sess., p. 214.

The Report of the House Committee on the Judiciary explains the effect of these provisions in detail, as follows:

> "Substantial evidence" means evidence which on the whole record is clearly substantial, plainly sufficient to support a finding or conclusion under the requirements of Section 7(c), and material to the issues . . .
>
> The sixth category, respecting the establishment of facts upon trial *de novo*, would require the reviewing court to determine the facts in any case of adjudication not subject to sections 7 and 8 or otherwise required to be reviewed exclusively on the record of a statutory agency hearing. . . . In short, where a rule or order is not required by statute to be made after opportunity for agency hearing and to be reviewed solely upon the record thereof, the facts pertinent to any relevant question of law must be tried and determined *de novo* by the reviewing court respecting either the validity or application of such rule or order—because facts necessary to the determination of any relevant question of law must be determined of record somewhere and, if Congress has not provided that an agency shall do so, then the record must be made in court. Sen. Doc. 248, 79th Cong., 2d Sess., pp. 279, 280.

A reading of these interrelated provisions of the Administrative Procedure Act thus demonstrates that the phrase "required by statute" included not only hearings provided by the express language of the statute but also where the statute had been construed to require a hearing. The narrow construction offered by respondents carries with it the presumption that the entire mode of judicial review in these important administrative proceedings is to be eliminated. Cases such as the issuance of certificates of public convenience and necessity by the Interstate Commerce Commission are to be tried *de novo* in the District Court. Such a radical departure from the accepted methods of review

is not necessary if the phrase "required by statute" is interpreted as Congress intended. A construction of Section 5 which includes those administrative adjudications, which are required, by construction of the statute as well as by its terms, to be determined on the record of a hearing, is consistent with this legislative purpose and avoids unreasonable results.

III.

"Required by Statute" Explained by House Committee Report.

An interpretation of "required by statute" in Section 5 of the Act as including hearings required by the statute either in express terms or by judicial interpretation is supported by the history of the same phrase used in Section 4 of the Act relating to administrative rule making.[8] A provision concerning rule making was inserted in the Act during consideration of S. 7 in the 79th Congress. This provision originally used the phrase "required by law". This phrase was changed by the House after S. 7 had been passed by the Senate to "required by statute" in order to conform to the language used in Section 5. The Senate subsequently passed the bill as amended by the House. The House Committee explained the effect of the change as follows:

> The change is made to conform to the language used in the introductory clause of section 5 respecting adjudications. A statute may, in terms, require a rule or order to be made upon the record of a hearing, *or in the usual case be interpreted as manifesting a Congressional intention so to require, and in either situation sections 7 and 8 would apply save as other exceptions are operative.* (Italics added.)
> Sen. Doc. 248, 79th Cong., 2d Sess., p. 285.

[8] Section 4(b) of the Administrative Procedure Act, 5 U.S.C. §1003(b) provides in part: "Where rules are required by statute to be determined on the record after opportunity for an agency hearing . . ."

The Committee therefore stated unequivocally its position that "required by statute" as used in Sections 4 and 5 of the Act included not only those cases where the statute in terms requires a hearing *but also those cases where the statute has been interpreted as requiring a hearing.* This is completely nullified by a holding that the Act applies only where the statute under which the administrative agency acts provides, in its terms, for a hearing.

This explanation by the House Judiciary Committee of the term "required by statute" as used in Sections 4 and 5 of the Administrative Procedure Act is particularly important in view of the arguments made by respondents in this Court and the Court below. It is asserted by respondents that the hearing afforded in a deportation case is required because of judicial construction of the Immigration Act in the application of customary concepts of due process. Thus, it was argued that the hearing in deportation is "required by law" rather than "required by statute". Respondents attempt to demonstrate that this distinction was recognized by Congress and embodied in Section 5 of the Administrative Procedure Act, notwithstanding the unequivocal statement to the contrary by the House Judiciary Committee. To do this, respondents rely upon statements made to, not by, a Congressional Committee some five years prior to the passage of the Administrative Procedure Act by Congress.[9] Thus, respondents rely upon the statements of the then Solicitor General and Commissioner of Immigration regarding S. 674, 77th Cong., 1st Sess. (1941), to the effect that the phrase "required by law" might be so broad as to force formal adjudicatory proceedings in those cases where the agency *ex gratia* afforded a hearing and that the provisions of the bill should be limited to instances where the matters are disposed of by formal hearing.[10] These

[9] Brief of Respondents in Court of Appeals 14-15.

[10] Solicitor General Biddle wrote: "In some cases certain agencies have *ex gratia* by regulations imposed upon themselves requirements of formal procedures through the applicable statute makes no such requirement. In order to exclude the possibility that such procedures come

statements, made years before the Act was passed, to a Congressional Committee, can hardly be decisive legislative history. Moreover, these excerpts do not establish that Congress recognized that the phrase "required by statute" would exclude a hearing required by judicial interpretation of the statute. The statements, however, do demonstrate that the administrative agencies were interested in the application of the adjudicatory provisions where formal hearing was necessary and not to instances where hearings were given as a matter of grace. The testimony of the Commissioner of Immigration shows that, at that time, the Immigration Service believed deportation proceedings should be subject to any administrative procedure statute and that its application to deportation proceedings would improve the system.[11]

Respondents also rely upon, for example, the statement in the Senate Judiciary Committee Print, June 1945, that:

> * * * The introductory clause removed from the operation of Sections 5, 7 and 8 all administrative

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within title III, the amendment is desirable." Senate Hearings on S. 674, 77th Cong., 1st Sess. 1941, p. 1456. The Commissioner of Immigration testified: "Now, when we come to Section 301. We think there ought to be some clarification of the first part of that section. As it now reads it provides that the section—that the act—the section of this title, as a matter of fact, 'shall be applicable to proceedings wherein rights, duties or other legal regulations are required by law to be determined after opportunity for hearing.'

"We think that that ought to be made more specific and that it ought to read something like this: That they shall apply 'only to proceedings wherein rights, duties or other legal relations are required by the constitution or statutes to be determined after opportunity for formal hearing, and if such a hearing be held, only upon the basis of a record made in the course of such hearing.'

"In other words, so that it would be clear that this statute would apply only to those matters of administrative function in our service, which are disposed of by formal hearing. This would mean exclusion cases and deportation cases." Senate Hearing on S. 674, 77th Cong., 1st Sess. 1941, p. 577.

[11] The Commissioner of Immigration testified: "Through section 301, it applies its hearing-commissioner system only to cases where by law formal procedures are now required. In other words, as we read it, its requirements apply only to deportation and exclusive cases . . . We think that the hearing-commissioner system would improve our present procedure to a considerable extent without stultifying the administration of the laws. . . ." Senate Hearing on S. 674, 77th Cong., 1st Sess., pp. 571, 575.

> procedures in which Congress has not required orders to be made upon a hearing.
>
> Sen. Doc. 248, 79th Cong., 2d Sess., p. 21.

To the same effect, see Sen. Doc. 248, 79th Cong., 2d Sess., pp. 28, 202, 260; 92 Cong. Rec. 2151-2152, 2155, 5649, 5651.

These citations likewise do not support an argument that Congress recognized a distinction between the phrase "required by statute" and "required by law." Nor do they establish that by using "required by statute", deportation proceedings were excluded from Section 5. The citations cannot stand for these propositions because at the same time identical language was used with regard to the phrase "required by law" which respondents concede includes deportation proceedings. For example, the same Senate Judiciary Committee Print in explaining the phrase "required by law" used in Section 4(b) states:

> As to that type of rules, moreover, it leaves agencies free to choose from the several common types of informal public rule making procedures * * * except where Congress has required that rules be issued only upon a hearing. In the latter case, the hearing and decision procedures of section 7 and 8 necessarily apply. Sen. Doc. 248, 79th Cong., 2d Sess., p. 19.

To the same effect on "required by law", see Sen. Doc. 248, 79th Cong., 2d Sess., pp. 76, 315. Manifestly such statements are not indicative of an intent to discriminate between hearings required by necessary judicial construction of the statute and those where the statute contains the word "hearing."

IV

Interpreting "Required by Statute" as Including Only the Requirements Found in the Terms of the Statute Results in an Unequal and Discriminatory Application of the Act.

Senator McCarran, in presenting the bill to the Senate, stated that in preparing the Administrative Procedure Act: ". . . the committee has followed the undeviating policy of dealing with types of functions as such and in no case dealing with administrative agencies by name * * * the committee feels that administrative operations should be treated as a whole, lest the neglect of some link should defeat the purposes of the bill." Sen. Doc. 248, 79th Cong., 2d Sess., p. 302.

Similarly the House Report on the Act states that: "The bill is meant to be operative 'across the board' in accordance with its terms, or not at all. Where one agency has been able to demonstrate that it should be exempted, all like agencies have been exempted in general terms. (See Sec. 2(a)). Where one agency has shown that some particular operation should be exempted from any particular requirement, the same function in all agencies has been exempted." Sen. Doc. 248, 79th Cong., 2d Sess., p. 250.

Uniform application of the Act's provisions to similar functions in different agencies and even within the same agency is completely destroyed by a holding that Section 5 is applicable only where the agency statute, in terms, requires a hearing. A few examples of the discriminatory effect of this interpretation are: Section 5 would apply to proceedings on applications for certificates of public convenience and necessity for the operation of aircraft,[12] to proceedings on applications for certificates of public convenience and necessity for operation of a radio station,[13] to the issuance of certificates of public convenience and

[12] Act of June 23, 1938, 52 Stat. 987, 49 U.S.C. §481(c).
[13] Act of June 19, 1934, 48 Stat. 1085, 47 U.S.C. §309.

necessity for the operation of gas pipe lines,[14] to proceedings for the registration of securities brokers,[15] to proceedings for the revocation of second class mail permits.[16] It would not, however, under this interpretation apply to proceedings for certificates of public convenience and necessity for the operation of a common carrier by motor vehicle,[17] or water,[18] or proceedings for permits for operation as a contract carrier by motor vehicle,[19] or by water,[20] or proceedings for permits authorizing operation as a broker of transportation,[21] or operation as a freight forwarder,[22] or to proceedings of the Post Office Department to bar use of the mails,[23] or to exclude obscene material from the mails.[24] In these cases where the Act would not apply, hearings are held by the agency concerned and the courts have held that, although not specified in the terms of the statute, the statutes require a hearing.[25]

It is thus apparent that, if Section 5 is applicable only where the statute in specific language requires it, it would not apply "across the board." The exemption afforded in Section 5 would not be on a functional basis but would rather depend on the magic presence of the word "hearing" in the specific section of the statute under which the agency acts. This implies an extraordinary discrimination in the intent and purpose of the Act. It assumes that it

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[14] Act of June 21, 1938, 52 Stat. 824, as amended. 15 U.S.C. §717 f.

[15] Act of June 6, 1934, as added June 25, 1938, 52 Stat. 1075, 15 U.S.C. §78 o.

[16] Act of March 3, 1901, 31 Stat. 1107, 39 U.S.C. §232.

[17] *Supra*, note 2.

[18] *Supra*, note 3.

[19] *Supra*, note 4.

[20] *Supra*, note 5.

[21] *Supra*, note 7.

[22] *Supra*, note 6.

[23] R.S. §3929, 39 U.S.C. §259.

[24] Act of March 3, 1873, 18 U.S.C. § 1461, *Walker* v. *Popenoe*, 80 U.S. App. D.C. 129, 149 F. 2d. 511.

[25] Interstate Commerce Commission certificate of license proceedings, *United States* v. *Pierce Auto Truck Lines*, 327 U.S. 515; *American Trucking Association* v. *United States*, 326 U.S. 77; Post Office Department use of fraud statute, *Pike* v. *Walker*, 73 App. D.C. 289, 121 F. 2d 37 and proceedings to bar obscene material, *Walker* v. *Popenoe*, 80 U.S. App. D.C. 129, 149 F. 2d 511.

was intended to deny application of the Act to the whole series of important administrative proceedings which the judiciary has repeatedly held, by construction of the statute, are required to be determined upon the record after opportunity for hearing and which are made by the agencies only upon a record of a hearing. If this had been the purpose, certainly the least that could have been done was to list examples of statutes which made, in their terms, no provision for hearing. But there is no such list and the legislative history including the reports of the Attorney General's Committee on Administrative Procedure shows that nothing was made available on this point.

Moreover, it should be noted that if the phrase were to be interpreted to mean only the terms of a statute, Congress could have used language to make this clear. It is significant in this aspect that in another section of the statute Congress did use additional language in order to limit the provisions to the express terms of the statute. Attention is called to Section 10(c) relating to reviewable agency action. In that instance Congress provided that "Except as otherwise *expressly required by statute*, agency action otherwise final shall be final for the purposes of this subsection . . ." (Emphasis supplied) Certainly it is a fair construction that if Congress had intended the interpretation now advanced by the respondents of "required by statute" in Section 5, similar language would have been used to accomplish the purpose.

Respondents attempt to explain the extraordinary result of applying the formal hearing procedures of the Administrative Procedure Act in proceedings for the revocation of a second class mailing permit and denying its application in proceedings for deportation on the ground that the administrative agencies might be uncertain as to proceedings covered by the Act, unless limited to those cases where the word "hearing" appears in the statute. It is urged that the agency cannot adequately prophesy whether hearings are required with only the requirements of due

process to guide it.[26] Of course, respondents could hardly entertain any doubt whether the Immigration Act requires a hearing to be given in a deportation proceeding or that the determination must be reached on the record of that hearing. *Japanese Immigrant Case*, 189 U.S. 86; *United States ex rel Vajtaver* v. *Commissioner of Immigration*, 273 U.S. 103; *Bridges* v. *Wixon*, 326 U.S. 135. Assuming that there are instances where the statute under which the agency takes action is silent as to a hearing and there is no judicial construction of its terms, the problem the agency faces is whether to give any hearing. The courts have long reversed agencies where they failed to decide correctly whether the statute required a hearing. The Administrative Procedure Act and Section 5 cannot complicate the problem of the agency or bring to bear a greater penalty if its decision is erroneous.

CONCLUSION

From the foregoing it is clear that Section 5 of the Administrative Procedure Act is applicable to cases of adjudication required either by the terms of the statute or by necessary judicial construction to be determined on the record after opportunity for agency hearing. Deportation proceedings have long been held to be adjudications required by construction of the Immigration Act to be determined on the record after opportunity for agency hearing. Accordingly, Sections 5, 7 and 8 of the Administrative Procedure Act are applicable to deportation proceedings save as other exemptions apply.

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[26] Brief of Respondents in the Court of Appeals, p. 17.

APPENDIX OF STATUTES

Section 16 of the Immigration Act of February 5, 1917, as amended, 39 Stat. 885, 8 U.S.C. 152 provides in part:

> . . . The inspection . . . of aliens, including those seeking admission or readmission to or the privilege of passing through or residing in the United States, and the examination of aliens arrested within the United States under this section, shall be conducted by immigrant inspectors, except as hereinafter provided in regard to boards of special inquiry . . . Said inspectors shall have the power to administer oaths and to take and consider evidence touching the right of any alien to enter, reenter, pass through, or reside in the United States, and, where such action may be necessary, to make a written record of such evidence.

Section 19 of the Immigration Act of February 5, 1917, as amended, 39 Stat. 889, 8 U.S.C. 155 provides in part:

> At any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this chapter . . . shall, upon the warrant of the Attorney General, be taken into custody and deported . . . In every case where any person is ordered deported from the United States under the provisions of this chapter, or of any law or treaty, the decision of the Attorney General shall be final.

Section 4 of the Administrative Procedure Act, Act of June 11, 1946, 60 Stat 238, 5 U.S.C. §1003 provides:

> Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—
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> (a) Notice.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof

in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) Procedures—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) Effective Dates—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) Petitions—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

Section 5 of the Administrative Procedure Act, Act of June 11, 1946, 60 Stat. 237, 5 U.S.C. §1004, provides:

In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

(a) NOTICE.—Persons entitled to notice of any agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) PROCEDURE.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

(c) SEPERATION OF FUNCTIONS.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as au-

thorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

(d) DECLARATORY ORDERS.—The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

Section 7 of the Administrative Procedure Act, Act of June 11, 1946, 60 Stat. 241, 5 U.S.C. §1006, provides:

In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal

bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) HEARING POWERS.—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) RECORD.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests

on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

Section 8 of the Administrative Procedure Act, Act of June 11, 1946, 60 Stat. 242, 5 U.S.C. §1007 provides:

In cases in which a hearing is required to be conducted in conformity with section 7—

(a) ACTION BY SUBORDINATES.—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and con-

clusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tenative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Section 10 of the Administrative Procedure Act, Act of June 11, 1946, 60 Stat. 243, 5 U.S.C. §1009, provides:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence of inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or

ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutinal right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record

or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Section 11 of the Administrative Procedure Act, Act of June 11, 1946, 60 Stat. 244, 5 U.S.C. §1010 provides:

> Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, and the provisions of section 9 of said Act, as amended, shall not be applicable. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected by the Commission from and with the consent of other agencies. For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommended legislation, subpena witnesses or records, and pay witness fees as established for the United States courts.